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ESSAY

THE JURISPRUDENCE OF PRIVACY IN A SPLINTERED SUPREME COURT

DAVID M. SMOLIN*

The United States Supreme Court's dramatic decision in *Planned Parenthood v. Casey*¹ underscores and exacerbates deep divisions within the Court and the nation regarding abortion, implied fundamental rights, and the role of the judiciary in a constitutional republic. Indeed, the opposition and controversy engendered by *Roe v. Wade*² and efforts to overrule *Roe* were a major theme of the opinions. The joint opinion of Justices Kennedy, O'Connor, and Souter referred six times to the controversy created by *Roe*.³ In the end, the joint opinion relied upon this controversy as a reason for reaffirming the "central holding" of *Roe*.⁴ Justice Scalia's dissent, on behalf of all four dissenters, underscored *Roe*'s extreme divisiveness by repeatedly comparing both *Roe* and the *Casey* joint opinion to *Dred Scott v. Sandford*.⁵ The *Casey* joint opinion, joined by Justices Blackmun and Stevens, claimed that the *Roe* Court, and implicitly the *Casey* majority, were "call[ing on] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁶

No one seemed to be listening. Ironically, the loudest howls of protest seemed to emerge from the abortion-rights community, which, ever since the submission of the certiorari petition, had seemed committed to declaring defeat in *Casey*.⁷ Despite Justice Blackmun's articulated judgment that

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1. 505 U.S. ___, 112 S. Ct. 2791 (1992).

2. 410 U.S. 113 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

3. *Casey*, 505 U.S. at ___, ___, ___, ___, ___, 112 S. Ct. at 2803, 2809, 2812, 2815, 2816.

4. *See id.* at ___, 112 S. Ct. at 2814-16.

5. *Id.* at ___, 112 S. Ct. at 2876, 2883, 2885 (Scalia, J., dissenting) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

6. *Id.* at ___, 112 S. Ct. at 2815.

7. *See* David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 385-88 (1992) (discussing abortion rights litigation strategy in *Casey*).

the heart of *Roe* had been reaffirmed,⁸ the abortion rights political and legislative strategy apparently mandated loud declarations that *Roe* had been effectively overruled.⁹ Pro-life responses were more mixed. Advocates were predictably upset over the Court's asserted reaffirmation of *Roe* but were pleased that the Court had upheld most of the statutes.¹⁰ There was, of course, no sign that pro-life advocates had finally "accepted" *Roe* as a "common mandate rooted in the Constitution."

The Supreme Court came within one vote of an explicit overruling of *Roe v. Wade*. On the other hand, the acceptance of much of *Roe* by three Reagan-Bush appointees suggests the possibility that a modified form of *Roe* will remain indefinitely. Underlying these uncertainties are important questions about the doctrines of substantive due process and privacy.¹¹ Would the overruling of *Roe* signal the wholesale abandonment of the doctrines of substantive due process and privacy? Is the partial reaffirmation of *Roe* a signal that the Court will extend privacy to adult consensual sexuality and overrule *Bowers v. Hardwick*?¹² What are the legitimate jurisprudential roots of privacy? How can the doctrine of implied fundamental rights be made consistent with the limited role of the judiciary in a constitutional republic? Is *Roe v. Wade* merely a logical extension of the Court's previous privacy cases? What kinds of philosophical, jurisprudential, or ideological presuppositions are represented in the Justices' various views of privacy?

The following analysis will not settle these questions to the satisfaction of all. Hopefully, however, the philosophical, ideological, and historical analysis of the various views of privacy and liberty will clarify what is at stake in this continuing jurisprudential controversy.

8. See *Casey*, 505 U.S. at ___, 112 S. Ct. at 2844 (Blackmun, J., concurring in part and dissenting in part).

9. See, e.g., *Don't be Fooled: Roe v. Wade is Dead*, N.Y. TIMES, July 1, 1992, at A16 (Planned Parenthood ad).

10. See USA TODAY, June 30, 1992, at 4A.

11. The recent retirement of Justice White, however, removes one of the four votes to overrule *Roe*.

This article will use the terms "substantive due process" and "right of privacy" more or less interchangeably. This use is based on this author's perception that the right of privacy is the application of substantive due process to a particular sphere of human life. It is interesting that the joint opinion in *Casey* largely refrained from using the terms "fundamental right" or "privacy," while repeatedly using the terms "liberty" and "substantive due process." The joint opinion thus analyzed the abortion right directly as a part of the doctrine of substantive due process. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2791.

12. 478 U.S. 186 (1986).

I. THREE THEORIES OF PRIVACY

A. *Introductory Considerations*

The current case law on privacy presents many uncertainties and paradoxes. It is difficult to reconcile Justice White's majority opinion in *Bowers v. Hardwick*¹³ with Justice Blackmun's majority opinion in *Roe v. Wade*.¹⁴ The Court has protected the use of contraceptives by the unmarried¹⁵ and by minors¹⁶ without according the same protection to the underlying sexual acts.¹⁷ Some privacy claims, such as those pertaining to parental rights and midwifery, have been rejected by the judiciary and virtually ignored by the Supreme Court¹⁸ despite Supreme Court language suggesting that they lie at the heart of privacy.¹⁹ The current uncertainties regarding the future of *Roe* add yet another imponderable to an already confused picture.

The uncertainties and paradoxes of privacy appear to result from an underlying struggle between three theories of privacy. One group of Justices, historically including Douglas, Brennan, Blackmun, Marshall, and Stevens, has viewed privacy as protecting the value of individual autonomy.²⁰ A second group of Justices, historically including Black and Rehn-

13. 478 U.S. 186 (1986).

14. 410 U.S. 113 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

15. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). It should be noted that *Baird* was decided based on "rational basis" equal protection analysis, and thus, at least technically does not extend to the unmarried a "fundamental right" to use contraceptives.

16. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

17. *See Bowers*, 478 U.S. at 195-96 (rejecting claim that consensual adult homosexual sodomy is a fundamental right in part because it would require the invalidation of other laws proscribing consensual adult sexuality; *see also Carey*, 431 U.S. at 688 n.5, 694 n.17 (rejecting the view that providing the right to unmarried minors or adults to use contraception necessarily includes rights to engage in sexual activity).

18. *See infra* notes 187-210 and accompanying text.

19. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding that the right of privacy protects choices regarding marriage, procreation, family relationships, childbirth, and childrearing). Parental rights are included within both "family relationships" and "childrearing." Choices regarding childbirth often occur in the context of a marriage relationship, involve the intimacies of marriage and of family relationships, and are among the first childrearing decisions made by a family. *See, e.g., Barbara McCormick, Childbearing and Nurse-midwives: A Woman's Right to Choose*, 58 N.Y.U. L. REV. 661, 683-93 (1983).

20. *See Bowers*, 478 U.S. at 204-06 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, J.J.) (describing privacy in terms of individual autonomy); *Doe v. Bolton*, 410 U.S. 179, 209, 211-18 (1973) (Douglas, J., concurring in *Roe* and *Doe*) (Douglas employs autonomy concept in describing his constitutional views.); *Eisenstadt v. Baird*, 405 U.S. 438, 439, 453 (1972) (Brennan, J.). Justice Brennan has clearly stated that the entire text of the Constitution is about "the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439 (1986).

quist, would have preferred to reject the view that certain unenumerated substantive due process rights are fundamental. These Justices would limit substantive due process review to the minimal requirement that all legislation be rationally related to a legitimate governmental interest. Some would eliminate substantive due process completely. Either path leads to the elimination of fundamental privacy rights.²¹ Finally, a third group of Justices, including Justice White and the second Justice Harlan, views the privacy right primarily as a way of protecting the traditional family from governmental interference.²²

The following sections will examine these three theories of privacy. First, I will analyze privacy as individual autonomy. This view is held by what is traditionally characterized as the liberal wing of the Court and was recently partially endorsed by Justices O'Connor, Kennedy, and Souter. The liberal wing of the Court has made its views of privacy rather clear. Thus, if Justices Blackmun, Brennan, Marshall, and Stevens had been able to consistently command a majority, privacy would clearly include a broad abortion right,²³ a broad right of adults to engage in consensual sexual acts,²⁴ and a broad right to die.²⁵ The ability of these Justices to win the votes of the swing Justices enabled the liberal wing to secure a broad abor-

21. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 n.7 (1990) (majority opinion of Rehnquist, C.J.) (citing *Bowers*, 478 U.S. at 194-95 for the proposition that the right to refuse medical treatment is a liberty interest rather than a privacy right); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion of Rehnquist, C.J.) (stating that abortion is a liberty interest); *Roe v. Wade*, 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992) (applying liberty interest analysis to abortion); *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting) (rejecting substantive due process).

Justice Black apparently viewed the Due Process Clause as entirely procedural, aside from its role in incorporating the Bill of Rights. Chief Justice Rehnquist, by contrast, would see at least a limited role for substantive due process in the evaluation of whether legislation is rationally related to a legitimate government interest.

22. See, e.g., *Bowers*, 478 U.S. at 190-96 (White, J., delivered the opinion of the Court) (adopting constitutional distinction between marital heterosexual activity and homosexual or nonmarital sexual activity); *Griswold*, 381 U.S. at 502-07 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 545-46, 552-53 (1961) (Harlan, J., dissenting) (distinguishing marital intimacy from homosexuality, fornication, incest, and adultery in the context of substantive due process).

23. See, e.g., *Casey*, 112 S. Ct. at 2838-43, 2843-55 (opinions of Justices Stevens and Blackmun); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Justices Blackmun, Brennan, Marshall, and Stevens among a majority invalidating even minimal regulation of abortion).

24. *Bowers*, 478 U.S. at 204-06 (1986) (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).

25. See *Cruzan*, 497 U.S. at 301-04 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.) (Right to die through refusing artificial nutrition and hydration is fundamental.); *id.* at 330, 343 (Stevens, J., dissenting) ("Choices about death touch the core of liberty."). Neither of these dissents states that the right of privacy includes the right to die. However, their use of

tion right from *Roe* in 1973 through the apex of the abortion right in *Thornburgh v. American College of Obstetricians & Gynecologists*²⁶ in 1986. On the other hand, the inability of this group of Justices to consistently command a majority led to the anomaly of *Bowers v. Hardwick* in 1986.²⁷ As these Justices retired and as the Reagan and Bush administrations appointed new Justices, *Roe* appeared increasingly anomalous. However, the joint opinion in *Casey* suggests at least partial adherence of Justices Kennedy, Souter, and O'Connor to privacy-as-autonomy, raising the question of whether *Bowers* could be overruled.

This article will demonstrate that privacy-as-autonomy has been shaped by a number of values beyond the mere embrace of individual choice. The fatal flaw in analyzing privacy under *Roe* is that the judiciary used the Con-

substantive due process analysis and emphasis on the right to choose in matters relating to death essentially bring them into the methodology of privacy-as-autonomy.

26. 476 U.S. 747 (1986).

27. The swing Justices on privacy issues from the early 1970s through the middle of the 1980s were Chief Justice Burger and Justices Powell and Stewart. Chief Justice Burger dissented in two of the Court's contraception cases, indicating that he would have upheld a variety of restrictions on the distribution of contraceptives. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 702 (1977) (Burger, C.J., dissenting without opinion); *Eisenstadt v. Baird*, 405 U.S. 438, 465 (1972) (Burger, C.J., dissenting). Chief Justice Burger joined the Court's opinion in *Roe*, but wrote a concurring opinion applicable to *Roe* and *Doe* arguing that the Court's opinion lacked the "sweeping consequences" claimed by the dissenters. *Roe*, 410 U.S. at 208 (Burger, J., concurring). By 1986, however, Chief Justice Burger had concluded that "some of the concerns of the dissenting Justices in *Roe* . . . have now been realized." *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting). Therefore, the Court "should reexamine *Roe*." *Id.* at 785.

Chief Justice Burger also supplied a critical vote to the Court's five to four rejection of sodomy as a fundamental right. *Bowers*, 478 U.S. at 186. Chief Justice Burger wrote a concurring opinion to "underscore" his view that "there is no such thing as a fundamental right to commit homosexual sodomy," declaring that such a holding would "cast aside millennia of moral teaching." *Id.* at 196-97 (Burger, C.J., concurring).

Justice Powell joined the Court after *Roe*, but strongly affirmed *Roe*'s holding in his majority opinion in *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 420 (1983)—an opinion which Chief Justice Burger joined. Justice Powell supplied a necessary fifth vote to the Court's holding in *Bowers*, adding a brief concurrence suggesting that a prison sentence for sodomy "would create a serious Eighth Amendment issue." *Bowers*, 478 U.S. at 197 (Powell, J., concurring). Justice Powell has, since leaving the Court, stated that his vote in *Bowers* was "probably . . . a mistake," because *Bower*'s holding is inconsistent with *Roe*. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3.

Justice Stewart dissented in *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965), but later joined the Court's opinion in *Roe*, stating in a concurring opinion that he now accepted *Griswold* as one of a long line of substantive due process decisions. See *Roe*, 410 U.S. at 168 (Stewart, J., concurring). Chief Justice Burger, Justice Powell, and Justice Stewart supplied the necessary votes, in combination with the *Roe* dissenters, to reject the abortion rights view that *Roe* demands equal governmental funding of abortion and childbirth. See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendment).

The vacillating views and votes of these swing Justices are the primary cause of the muddled and confused state of the privacy case law from the early 1970s through 1986.

stitution to promote a very particular and ideological set of extra-constitutional values. If *Roe* were overruled in the ways proposed by Chief Justice Rehnquist and Justice Scalia, it might precipitate a conflict between no-privacy theorists and those, whom I term "family sphere theorists," who want to use the privacy right to protect the traditional family. The fate of privacy would then depend upon the resolution of this conflict.

I will suggest that the true roots of privacy are found in certain implicit constitutional understandings about the relationship between government and the family. I will also suggest that the unfortunate misuse of privacy by autonomy theorists should not be used as a basis to eliminate these implicit understandings from our constitutional framework. Privacy, properly understood, is as necessary to the process of representative government and the management of social conflict as are textual rights such as free speech. Thus, the post-*Roe* era of privacy would hopefully involve the flowering, rather than the decay, of the doctrine of privacy.

B. Privacy as Individual Autonomy

1. The Cheerful Existentialism of Privacy-as-Autonomy

A prestigious group of legal scholars and a significant number of Supreme Court Justices have viewed the right of privacy as a vehicle for furthering the value of individual autonomy.²⁸ The term "individual autonomy" deserves careful definition. The term "individual" refers to individualism, which is defined literally as either "a doctrine that the interests of the individual are or ought to be ethically paramount," or "the conception that

28. See, e.g., Brief for a Group of American Law Professors as Amicus Curiae, in support of Reprod. Health Servs. [hereinafter *Webster* Brief], *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989). The above brief was on behalf of 885 American law professors. Its link to autonomy theory is twofold. First, it reaffirmed *Roe*'s "central holding." *Webster* Brief at 2. Second, the brief's argument was conceptually an autonomy argument complemented by an equality argument. Thus, for example, the brief stated that the "essence of [the privacy right] is freedom from governmental control over the diverse choices by which people crucially define their values and shape their lives." *Id.* This language is reminiscent of Justice Blackmun's emphasis, in his *Bowers* dissent, regarding the self-defining nature of choices about sexuality. *Bowers*, 478 U.S. at 204-06 (Blackmun, J., dissenting). The law professors on whose behalf the brief was submitted include a number of well-known professors, among which are: Bruce Ackerman, Barbara Allen Babcock, Derrick Bell, Richard Chused, Walter Dellinger, Norman Dorsen, Susan Estrich, Daniel Farber, Thomas Franck, Gerald Frug, Thomas Grey, Duncan Kennedy, Sylvia Law, Kristen Luker, Mari Matsuda, Martha Minow, Kathleen Sullivan, Laurence Tribe, Mark Tushnet, Lloyd Weinreb, and Robert Weisberg. Frank Michelman and Norman Redlich are among the attorneys listed on the brief. Law review articles and books analyzing privacy from an explicit or implicit autonomy perspective are endless. See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); Kenneth L. Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624 (1980).

all values, rights, and duties originate in individuals.”²⁹ In legal discourse individualism produces a tendency to reduce associations and groups, such as families, religious communities, and nations, to mere collections of self-interested individuals, with a corollary habit of analyzing issues of constitutional law and political theory in terms of the struggle of the individual against the state.³⁰ The term autonomy is literally defined as “the quality or state of being self-governing.”³¹ The term derives from the Greek “auto” for self and “nomos” for law, so that it can be literally defined as being a law for, or unto, oneself.³² “Individual autonomy” thereby refers to the individual as the self-governing source of law or rights.

The term autonomy more broadly connotes a view, derived perhaps from a cheerful interpretation of Sartre’s existentialism, that human beings create and define themselves through their choices and acts; the relevant slogan is that “existence precedes essence.”³³ Human beings, in other words, are not limited or defined by any binding or higher authority, whether it be God or nature.³⁴ This view is coupled with an interpretation of John Stuart Mill’s theory of liberty which views the power of the state as limited to the prevention of harm to the person or property of others, thereby eliminating the authority of the state to legislate based on morality.³⁵

The existence of these strands of “individual autonomy” in the case law and legal literature is easily documented. Justice Blackmun’s eloquent dissent in *Bowers v. Hardwick*, which represented the views of four Justices, in itself reflects all of these themes. Consider the following excerpt:

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of

29. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 428 (3d ed. 1967).

30. See *Bowers*, 478 U.S. at 204-05 (Blackmun, J., dissenting) (redefining privacy cases about family relationships as cases about individual choices); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (redefining *Griswold*’s protection of marital intimacy as protection of the individual); Brennan, *supra* note 20, at 439 (Entire constitutional text concerns the relationship of the individual and the state and the bounds of official authority and individual autonomy.).

31. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 60 (3d ed. 1967).

32. I OXFORD ENGLISH DICTIONARY, 807 (Clarendon Press, 2d ed. 1969).

33. See JEAN-PAUL SARTRE, EXISTENTIALISM 15 (Bernard Frechtman trans., 1947).

34. See *id.* at 27.

35. Professor George Wright, writing in the context of free speech principles, has noted that Mill’s writings rejected a broad view of individual autonomy associated with mere freedom from restraint, libertarianism, and ethical relativism. See R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 5-10 (1990). Thus, the view of governmental power commonly ascribed to Mill is arguably a distortion of Mill’s actual position. See, e.g., Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47, 51-53 (1990) (Both Hart and Devlin misconstrue Mill by ignoring Mill’s substantive, developmental view of human flourishing.).

governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." While it is true that these cases may be characterized by their connection to protection of the family, the Court's conclusion that they extend no further than this boundary ignores the warning . . . against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. The Court recognized . . . that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."³⁶

Justice Blackmun views families and other forms of human association as means serving the end of the personal development and continual self-definition of the individual. Blackmun's individualism thus reduces the family and other groups to mere collections of self-interested individuals. Blackmun's individualism also views the entire history of the privacy right as a part of the conflict between the individual and the state. Thus, to Blackmun, privacy cases that rhetorically or technically appeared to protect a certain form of association, such as marriage and the parent-child relationship, actually center on the freedom of the *individual* rather than on the inherent value or worth of any particular form of association. The amoral nature of this individualism is implicit in Blackmun's rejection of any "preference for stereotypical households."³⁷

36. *Bowers v. Hardwick*, 478 U.S. 186, 204-05 (1986) (Blackmun, J., dissenting) (alterations in original) (citations omitted).

37. *Id.* at 205 (citing *Moore v. East Cleveland*, 431 U.S. 494, 500-06 (1977) (plurality opinion)).

Blackmun's next paragraph makes more explicit the amorality of his individualism, and the link of this amorality to his implicit Sartrean existentialism:

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key-relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.³⁸

Blackmun thus suggests that individuals possess a fundamental right to engage in self-defining associational acts, at least so long as they are consensual and involve adults. This proposed *legal* standard is clearly based on the Sartrean existentialist view that "existence precedes essence," or more directly, that we create ourselves through our choices. Blackmun's very use of the term "self-defining act" apparently is a reflection of the Sartrean view that we are not bound by nature or God to any fixed way of being, but rather "create" ourselves through our choices.³⁹ Therefore, "choice" for both Sartre and Blackmun is a higher value than any traditional concept of a fixed moral code;⁴⁰ the essence of choice is the ability to define, for oneself, one's own morality.⁴¹ Thus, Blackmun appropriately places quotations around the word "right" to indicate that the term is definable only individualistically.

Blackmun italicizes "choice" as a way of emphasizing that associations are primarily valuable because persons *choose* them, rather than because of the inherent value or nature of the associations themselves. This subservience of human relationships to the value of making choices about those relationships again echoes Sartre.⁴²

38. *Id.* (citations omitted).

39. See, e.g., SARTRE, *supra* note 33, at 15-19; JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 34-45 (Hazel E. Barnes, 1956) [hereinafter SARTRE, NOTHINGNESS].

40. See, e.g., SARTRE, *supra* note 33, at 51-57 (Man makes himself by his choices; freedom is the basis of all values.).

41. *Id.* at 51. Sartre writes: "Man makes himself. He isn't ready made at the start. In choosing his ethics, he makes himself, and force of circumstances is such that he can not abstain from choosing one." *Id.*

42. *Id.* at 56-57. Sartre discusses the dilemma of whether a woman should satisfy her passion or defer to the man's fiance by ultimately concluding that "[o]ne may choose anything if it is on the grounds of free involvement." *Id.* at 57.

Blackmun's citation of Karst's article, *The Freedom of Intimate Association*, is also revealing.⁴³ Karst argues that the freedom of intimate association necessarily includes the right of disassociation.⁴⁴ The law, Karst argues, must grant a legal right to unilateral divorce on demand—a disassociational right—in order to truly protect marriage as a free association.⁴⁵ Karst discusses “the paradox that making divorce fundamental, and thus readily obtainable, might in the end make marriage seem much less so.”⁴⁶ Karst argues that the legal right to divorce actually enhances marriage because each day that the spouse stays “she chooses the commitment.”⁴⁷ Therefore, Karst elevates choice as the ultimate value in relationships, while necessarily redefining “commitment” to mean the act of doing, in the moment, what one chooses. The entire traditional concept of commitment as a binding *future* obligation completely disappears, apparently because such a view of commitment would interfere with the full realization of the value of individual self-definition. Karst's view of “commitment” is of course consistent with Sartre's view that “freedom . . . is characterized by a constantly renewed obligation to remake the *Self*. . . .”⁴⁸

The right of self-identification includes the right of self-development—the right to not be bound by our prior choices. Our ethics, associations, identity, and selves are not only individualistic but also necessarily revisable. Existence, Sartre claims, continually precedes essence; we create ourselves not merely this moment, but every moment.⁴⁹ The very act of choice is the ultimate value, as everything we choose, whether relationships, morals, acts, or identity, is itself valuable only so long as we continue to choose it.⁵⁰

Justice Blackmun's view of privacy is therefore premised on a certain definition of the human person. Persons are those who make *choices* by which they define, create, and develop themselves. Blackmun believes that certain choices are particularly self-defining; choices, for example, about relationships and ethics. Thus, persons are those who make choices *regarding relationships and ethics* by which they define, create, and develop themselves.

43. Karst, *supra* note 28, at 637.

44. *Id.* at 671-72 (Constitution requires no-fault divorce.).

45. *Id.*

46. *Id.* at 637 (quoting J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 577 (1977)).

47. Karst, *supra* note 28, at 638.

48. SARTRE, *NOTHINGNESS*, *supra* note 39, at 34-35 (emphasis in original).

49. SARTRE, *supra* note 33, at 28 (Man is condemned every moment to invent man.); SARTRE, *NOTHINGNESS*, *supra* note 39, at 34-37.

50. See, e.g., SARTRE, *NOTHINGNESS*, *supra* note 39, at 38.

2. Individual Autonomy and Abortion

The conceptual link between Justice Blackmun's opinions in *Bowers v. Hardwick* and *Roe v. Wade* has not been sufficiently understood. *Roe* has received scathing criticism,⁵¹ while Blackmun's *Bowers* dissent is generally treated sympathetically.⁵² Much of the criticism of the *Roe* opinion reflects the desire to justify the abortion right in a more compelling and reasoned way.⁵³ The primary defect of *Roe* is seen as its lack of explanation for the result reached.⁵⁴ Analysis of *Roe* and its progeny demonstrates that the concept of the person presented in Blackmun's *Bowers* dissent is helpful in explaining *Roe*.

The major dilemma facing those desiring to rewrite *Roe* is explaining why a woman's desire to abort outweighs the fetus's right to life. Justice Blackmun's *Roe* opinion asserted that the Court "need not resolve the difficult question of when life begins."⁵⁵ Blackmun's claim of agnosticism concerning the nature of the fetus has never been particularly compelling to the scholarly community. Indeed, as the years have passed, academic support-

51. A complete review of the literature is impossible here as *Roe* has been the subject of over 200 law review articles. See Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. REV. 231, 237 n.39 (1985). Many of the more prominent critics of *Roe* have come from outside of the pro-life community. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27-28 (1975). The editors of the MICHIGAN LAW REVIEW surveyed the literature on *Roe* and concluded: "[T]he consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying."; *Editors Preface*, 77 MICH. L. REV. 1568, 1568 (1979); ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

52. For example, one commentator labeled the opinion as "the seminal statement on the right to privacy" and praised it as "consummately humanistic" and showing "deep understanding and sensitivity." Larry Gostin, *Guest Editor's Introduction*, 13 AM. J.L. & MED. 153, 157-58 (1987).

53. See, e.g., Douglas E. Barzelay & Phillip B. Heymann, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973) Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 269 (1975). Professor Tribe alone has adopted several different theories for supporting the result in *Roe*. See Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (*Roe* necessary because abortion issue is intrinsically religious.); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (*Roe* necessary to aid evolution of new societal consensus.); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 928-29 (1978) (repudiating view that *Roe* is necessary because abortion issue is inherently religious); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1337-59 (2d ed. 1988) (*Roe* necessary for women's equality, and supported by proscription against involuntary servitude) [hereinafter TRIBE, *CONSTITUTIONAL LAW*].

54. See, e.g., John A. Robertson, *Gestational Burdens and Fetal Status: Justifying Roe v. Wade*, 13 AM. J.L. & MED. 189, 200-01 (1987) (noting Court's failure to explain its choice of viability standard).

55. *Roe v. Wade*, 410 U.S. 113, 159 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

ers of the abortion right have moved away from ridiculing or ignoring fetal characteristics and rights to addressing why the life of the fetus must give way to the desires of the woman.⁵⁶

On its face, the principle of individual autonomy does not explain the result in *Roe*. The obvious question remains: What about the autonomy of the fetus? The result in *Roe*, however, is consistent with the view of the person articulated in Blackmun's *Bowers* dissent.⁵⁷ This consistency is made apparent by more recent efforts to rewrite *Roe*.

Recent justifications of *Roe* have focused on two different kinds of fetal characteristics. Professor Tribe is illustrative of commentators who focus on nonviability as the fetal characteristic that justifies *Roe*.⁵⁸ Professor Tribe notes that the previsible fetus, even if viewed as a "genuine baby" or a full human being, is uniquely dependent on her mother.⁵⁹ This dependence is unique because it is nontransferable—no one else can bear the mother's burden and successfully sustain the fetus. Professor Tribe argues that our society generally does not require particular individuals to use their bodies to sustain another's life, even if they are related to that individual.⁶⁰

Professor Tribe's analysis is consistent with the views of associations and of persons articulated in Justice Blackmun's *Bowers* dissent.⁶¹ Both Tribe and Blackmun focus on the individual when discussing associations; both perceive the element of individual choice as the preeminent value in associations. According to Justice Blackmun, associations are rich and meaningful precisely because we can choose their nature and form.⁶² Implicit in this statement is a recognition of the individual's right to sever, or refuse, associations. Justice Blackmun does not protect associations per se; instead, he protects the rights of individuals to make individual choices concerning associations.⁶³ Given this view of associations, it is entirely consistent to state that an individual woman has a right *not to associate* with her unborn child, even if the child is fully human and uniquely dependent upon

56. Legal commentators illustrating this trend include Catherine MacKinnon and Laurence Tribe. See CATHERINE MACKINNON, *FEMINISM UNMODIFIED* 94 (1987); TRIBE, *CONSTITUTIONAL LAW*, *supra* note 53, at 1352-59; The seminal article defending legal abortion even if the unborn are human persons predates *Roe*. See Judith Jarvis Thompson, "A Defense of Abortion," 1 *PHIL. & PUB. AFF.* 47 (1971).

57. *Bowers v. Hardwick*, 478 U.S. 186, 204-06 (1986) (Blackmun, J., dissenting).

58. See generally TRIBE, *CONSTITUTIONAL LAW*, *supra* note 53.

59. *Id.* at 1356.

60. See *id.* at 1354-58; see also LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* 17 (1985) (conceding that fetus can plausibly be described as a "genuine baby").

61. *Bowers*, 478 U.S. at 204-06 (Blackmun, J. dissenting).

62. *Id.* at 205.

63. See generally *id.*

her. The result may be, as Tribe acknowledges, tragic,⁶⁴ but it follows from the very nature of human persons, as viewed through the lens of the broad privacy right.

In addition, the unique dependence of the previable fetus suggests that the fetus is not a person, or not fully a person, under Blackmun's personhood definition.⁶⁵ Persons, according to Blackmun, are those able to make choices regarding associations.⁶⁶ By definition, a previable fetus cannot make choices regarding associations because the fetus cannot live without being physically within the mother's body. The previable fetus's dependency upon her mother is so profound, so physical, and so essential to continued life, that it is fair to view the previable fetus as lacking the situational capacity to make choices regarding associations. Thus, the utter helplessness and dependency of the previable fetus upon her mother leads to the conclusion that the woman-fetus relationship is not necessarily a true association. Rather, the mother-fetus dyad will only have value, and be a true association, if the mother, a true or full person, chooses to treat it as such.

Total reliance on viability is unsatisfactory to some. First, the view that persons have the right to make choices to end associations does not explain why that right outweighs a right to survive and be brought to birth in a viable condition. Second, the view is unsatisfactory because it eliminates fetal rights by virtue of characteristics that are purely relational. Viability is not a characteristic of the fetus, but instead is a characteristic of the *relationship* between the fetus, the pregnant woman, and developing medical technology. A fetus that was previable in 1960 might be viable in 1990. It is unsettling to determine the moral rights of the fetus in terms that change with medical technology and have no inherent relation to the actual characteristics of the fetus.

These gaps in the viability standard are apparently filled by reference to inherent characteristics of the fetus. Justice Stevens's concurring opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*⁶⁷ illustrates a combination of the viability approach with the fetal characteristics approach:

Justice White is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment

64. TRIBE, CONSTITUTIONAL LAW, *supra* note 53, at 1358.

65. *Bowers*, 478 U.S. at 204-06 (Blackmun, J., dissenting).

66. *Id.*

67. 476 U.S. 747 (1986).

of birth. . . . I should think it obvious that the State's interest in the protection of an embryo—even if that interest is defined as “protecting those who will be citizens,”—increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.⁶⁸

Roe mentions only one of the four criteria named by Justice Stevens—the ability to survive, or viability—in its evaluation of state interests in fetal life.⁶⁹ The state's interest in potential or fetal life was said to grow “in substantiality as the woman approaches term,”⁷⁰ but growth of this state interest could not justify any restrictions on, or regulation of, the abortion right until it became “compelling.”⁷¹ Viability was the sole determinant of when the state's interest became compelling, and thus became the sole relevant consideration in determining fetal rights. Justice Stevens's defense of *Roe* therefore seems to contradict it by relying on three fetal characteristics that are apparently irrelevant under *Roe* and its progeny.

A number of commentators have attempted to rewrite *Roe* by suggesting that the time at which viability occurs is a fair dividing point because prior to that time the fetus is not sufficiently developed to consider it a “person.” These commentators make reference to inherent fetal characteristics, principally brain and nervous system development and consequent abilities, as the ultimate criterion of fetal rights.⁷² The fetal capacities noted by Justice Stevens—capacities to feel pleasure and pain, and to react to surroundings—are results of brain and nervous system development and are consistent with this approach.

These fetal development criteria are also consistent with the view of the human person reflected in Justice Blackmun's *Bowers* dissent.⁷³ The requisite level of development is defined in terms of human consciousness and volitional activity: to feel pleasure and pain, to react to the environment,

68. *Id.* at 778 (Stevens, J., concurring) (citations omitted).

69. *Roe v. Wade*, 410 U.S. 113, 162 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

70. *Id.* at 162-63.

71. *Id.*

72. See Ronald E. Cranford, M.D. & David R. Smith, *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood*, 13 AM. J.L. & MED. 233, 239 (1987); Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1986); Robertson, *supra* note 54, at 198-202; Ken Martyn, Note, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194 (1982). This viewpoint therefore suggests that viability *in itself* would be an inadequate standard because “viability does not mark a particular biological change in the fetus. The viable fetus has no more capability for self-awareness or feeling pain than a pre-viable fetus.” Rhoden, *supra*, at 663.

73. *Bowers v. Hardwick*, 478 U.S. 186, 204-06 (1986) (Blackmun, J., dissenting).

and to choose to act rather than just to act. As persons are viewed primarily as those with a free will—those who experience and choose—then personhood requires a certain minimal level of brain development.⁷⁴

The facts in this area are quite controversial. It is difficult to know precisely when a fetus can feel pleasure or pain because physiological reactions to stimuli can arguably occur automatically without any *consciousness* or inner experience. The fetus clearly reacts to her environment long before viability; it is difficult to know, however, whether those reactions represent automatic physiological function or conscious experience accompanied by volitional choice. In speaking of fetal experience, consciousness, and choice, we enter a twilight zone of seemingly unprovable assertions.⁷⁵

The definition of personhood in terms of volition and consciousness suggests that the previable fetus does not make choices and have experiences in the same way as a teenager or adult. The fetus, therefore, is either not a person or is *less of a person* than the woman carrying the fetus. If the ultimate goal is the free development of *personality*, and personality development implies the capacity and freedom to make conscious choices, then given a choice between a person fully capable of choices and a partial person not so equipped, one favors the fully developed person. Personhood gives rights that can be limited only by the rights of other persons. The maximization of *personality* requires that those capable of choices not be inhibited by the supposed needs of those living forms who are not as yet truly capable of choice.

One objection to the fetal characteristics approach to abortion has been that it would lead to infanticide. For example, it has been stated, that the

74. Michael Tooley is one example of those who explicitly make a separation between being a biological member of the species, and being a "person," and whose "personhood" criteria is linked to brain and nervous system development and certain consequent abilities. See generally MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* (1983). Mr. Tooley's argument is somewhat distinctive in that he relies on "the property of being an enduring subject of non-momentary interests," rather than capacities for rational thought, free action, or self-consciousness, as his primary definition of personhood." *Id.* at 303. Tooley, however, does consider definitions of personhood relying on these capacities to be competing plausible approaches. See *id.* at 359. Moreover, Tooley's definition of personhood includes within it various capacities, such as the capacity to have thoughts about times other than the present, which constitute specific conscious thought processes. *Id.*

75. Other writers have noted the parallel problem of determining the correlation between "thought processes and the brain's physical and electrical development. . . ." Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451, 1493 n.332 (1984) [hereinafter *Live Birth Dilemma*] (quoting Martyn, *supra* note 72, at 1209); see also Rhoden, *supra* note 72, at 663 nn.133-34. On the question of fetal pain, see K.J.S. Anand et al., *Pain and Its Effects In the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 1321 (1987). The ability of the fetus to respond to stimuli, regardless of whether it experiences pain, appears to be established.

neonate is also not a "person" in the full sense of the term.⁷⁶ The previable fetus during much of her development resembles a neonate more closely than a neonate resembles an adult.⁷⁷ The combination of the fetal characteristics approach and the viability approach is capable of answering this objection. Society as a whole is obligated to human nonpersons because they have the potential to attain personhood.⁷⁸ Previable fetuses are distinct from neonates because only one other person in the world can sustain their claim to develop into persons. Once a fetus becomes viable, her right to develop does not directly conflict with the right of any other person to control their body.⁷⁹ It is the combination of lack of development and dependence which requires that a previable fetus be subject to abortion if her mother chooses that alternative.⁸⁰

Justice Blackmun's dissent in *Webster v. Reproductive Health Services*⁸¹ is particularly significant because he, as the author of *Roe*, quoted and embraced the argument previously made by Justice Stevens that the viability standard is supported by inherent fetal characteristics.⁸² Justice Blackmun apparently found the combined dependency/inherent characteristics test of

76. See, e.g., TOOLEY, *supra* note 74, at 407. Tooley appears to accept the inference that infanticide, like abortion, should be permitted. See *id.* at 413-16.

77. Thus, Michael Tooley's review of the scientific evidence relating to behavioral capacities and neurophysiological development leads him to conclude that the human neonate, and thus presumably the fetus, lack the capacities necessary to most current definitions of personhood. See TOOLEY, *supra* note 74, at 357-407. Thus, the fetus and neonate are both nonpersons, while older children and adults are persons.

78. It has been debated whether potential persons, those with the capacity to develop into persons, should be protected by virtue of their potentiality. See, e.g., *id.* at 165-285.

79. See TRIBE, CONSTITUTIONAL LAW, *supra* note 53, at 1357-58. Tribe supports the viability line even if previable fetuses are regarded as "full human beings" rather than human nonpersons or potential life. *Id.* at 1354. His views on the distinction between society's obligation to the fetus, and the woman's obligation, therefore do not depend on labeling the fetus as a "potential" person.

80. The distinction between a woman's right to removal of a fetus, and her right to the death of a fetus have been discussed. Even given a pro-choice premise, it can be held that a woman does not have a right to a dead fetus or dead baby. The issue has presented practical applications because some abortions have produced live births and because attempts have been made to limit the choice of abortion technique in the interest of fetal survival.

81. 492 U.S. 490, 537-60 (1990) (Blackmun, J., dissenting).

82. *Id.* at 552-53 (Blackmun, J., dissenting). Justice Blackmun quoted the portion of Justice Stevens's *Thornburgh* concurrence, which enunciates the combined dependency/fetal characteristics approach to fetal rights, and commented that "I cannot improve upon what Justice Stevens has written." *Id.* at 552 (Blackmun, J., dissenting). Justices Brennan and Marshall joined Justice Blackmun's *Webster* dissent. Justice Blackmun's language was apparently taken from an abortion rights amicus curiae brief submitted on behalf of a large group of law professors. See *Webster* Brief, *supra* note 25, at 4 ("State cannot define a compelling interest in the fetus that is distinct from, and paramount to, the rights or interests of the pregnant woman").

fetal rights so compelling that he virtually jettisoned his prior agnosticism in favor of absolutist language:

The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.⁸³

Thus, while Justice Blackmun's opinion in *Roe* had considered the question of when life begins so unresolvable as to mandate state skepticism,⁸⁴ his *Webster* dissent reveals a man so certain that the previable fetus lacks rights that he is willing to label the pro-life position as objectively unreasonable.⁸⁵

David Hume could have told Blackmun that a gap exists between his enunciation of certain facts about fetal development and his evaluative conclusion regarding fetal rights.⁸⁶ The missing link between the biological facts and Blackmun's conclusion is found in Blackmun's Sartrean autonomy premises, as stated in *Bowers*.⁸⁷ Moreover, even autonomy theory is less determinate than Blackmun's absolutism suggests.

First, the fit of the theory to the law is not exact. Although Tribe, Stevens, and Blackmun defend the viability standard, the Court's broad defini-

83. *Webster*, 492 U.S. at 553 (Blackmun, J., dissenting). Justice Blackmun's statement that the fetus cannot be viewed as having rights "paramount to" the pregnant woman is an odd way of stating that the previable fetus's right to life can never outweigh the woman's right to choose an abortion. Obviously, some would argue that abortion prohibitions equalize the rights of woman and fetus, rather than making the fetus's rights "paramount." This is the view, for example, of the Eighth Amendment of the Irish Constitution, which asserts "the right to life of the unborn" and "the equal right to life of the mother." I.R. CONST. amend. VIII.

84. See *Roe v. Wade*, 410 U.S. 113, 159-62 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

85. See generally *Webster*, 492 U.S. at 552-53 (Blackmun, J., dissenting).

86. See DAVID HUME, A TREATISE OF HUMAN NATURE 520-21 (Penguin E. Mossner ed., 1969) (Moral conclusions cannot be deduced from facts.). The fact-value distinction disappears in the light of a teleological universe. See, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE 57-59, 83-84 (2d ed. 1984); CORNELIUS VAN TIL, THE DEFENSE OF THE FAITH 96-150 (3d ed. 1967). Justice Blackmun's judicial relativism, however, necessarily presupposes that constitutional reasoning must assume the lack of such a universe. Therefore, it is highly ironic that Justice Blackmun would confound facts and values in such absolutist terms.

87. See, *Bowers v. Hardwick*, 478 U.S. 186, 204-06 (1986). It could be stated that Blackmun possesses, in a paradoxical sense, an existentialist "teleology of freedom" that makes sense of his jump from the facts of fetal development to the conclusion concerning fetal rights. The difficulty, of course, is those who differ with Blackmun's philosophy, or view of the teleology or function or purpose of life, are apt to draw very different evaluative inferences from the facts of fetal development. Unless Blackmun is willing to label all nonexistentialists as irrational, he cannot condemn fetal rights as objectively irrational. Indeed, it is hard to know what definition of "rationality" would comport with the subjectivism, existentialism, and relativism suggested in Blackmun's *Bowers* dissent.

tion of "health" under *Doe v. Bolton*,⁸⁸ *Roe's* companion case, has made it very difficult to prohibit even third-trimester abortions.⁸⁹ The Court, moreover, clearly withheld constitutional personhood from the fetus until birth.⁹⁰

Second, the fit between autonomy theory and *Roe* is one of plausibility or reasonableness, not one of necessity. Autonomy theory can reasonably lead to a wide variety of conclusions regarding the developmentally immature. Although the autonomy theory plausibly leads to a viability or birth standard, it also plausibly leads to the allowance of infanticide, based on the lack of brain development of the neonate and the parental and societal interest in avoiding the burden of unwanted or defective offspring.⁹¹ By contrast, autonomy theorists can, with logic and consistency, embrace strict prohibitions against abortion. Some who value individual autonomy will believe that the fetus's interest in life outweighs the woman's interest in aborting; the fetus's greater interest, that of physical survival, can be seen as compensating for her lesser degree of development. The fact that even medical textbooks and abortion rights advocates describe the fetus, well before viability, as looking and even functioning like a human baby,⁹² may move some to demand that society protect the fetus, regardless of the lack of cognitive development.

The looseness of the link between *Roe* and autonomy theory is illustrated by the joint opinion in *Planned Parenthood v. Casey*.⁹³ Justices Ken-

88. 410 U.S. 179, 192 (1973).

89. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986) (cannot require any trade-off between maternal health and survival of a viable fetus); *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), *aff'd sub nom.*, *Womens Servs. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (per curiam) (invalidating statute prohibiting postviability abortion except where the procedure was "necessary to preserve the woman from imminent peril that substantially endangers her life or health"); *Margaret S. v. Edwards*, 488 F. Supp. 181, 196-97 (E.D. La. 1980) (invalidating Louisiana law permitting postviability abortions to prevent "permanent impairment" to woman's health), *aff'd*, 794 F.2d 994 (5th Cir. 1986); JOHN T. NOONAN, JR., A PRIVATE CHOICE 12 (1979) (*Roe* and *Doe* permit postviability abortion where pregnant woman can find "an abortionist who believed she needed an abortion"). But see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (reemphasizing viability standard).

90. *Roe v. Wade*, 410 U.S. 113, 158 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

91. See generally TOOLEY, *supra* note 74, at 413-16.

92. Laurence Tribe, noting that the fetus possesses brain waves and human features, stated that the fetus can plausibly be described as a "genuine baby." TRIBE, *supra* note 60, at 17. A medical school text states that by the end of the eighth week "the main organ systems have been established . . . and the major features of the external body form are recognizable . . ." T.W. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY 58 (5th ed. 1985). The text further comments, in words accompanying a photograph of a 12 week fetus in utero, that "[t]he face has all the human characteristics . . ." *Id.* at 83.

93. 505 U.S. ___, 112 S. Ct. 2791 (1992).

nedy, O'Connor, and Souter warmly embraced autonomy and the recognition of a woman's liberty interest in choosing abortion.⁹⁴ They refused, however, to affirm the correctness of *Roe's* balancing of the woman's autonomy and fetal survival. The plurality relied on *stare decisis* in upholding *Roe's* viability standard, while hinting that one or more of them would have upheld significant previability prohibitions of abortion had the question not already been determined in *Roe*.⁹⁵ The joint opinion's reliance on *stare decisis* rather than "reasoned judgment"⁹⁶ or "principled justification,"⁹⁷ underscores the arbitrariness of *Roe's* viability standard and balancing of maternal and fetal rights, even within an autonomy framework.

The looseness of the argument linking the autonomy theory to *Roe* leads to the question of why so many autonomy theorists have embraced and defended *Roe*. Michael McConnell has commented that finding a rationale for *Roe* has seemed to be "the holy grail of modern constitutional theorizing."⁹⁸ Clearly, many have been committed to *Roe* before finding any adequate justification, at least as a matter of constitutional law. What aspect of the autonomy theory has led to this reflexive, pre-analytic embrace of *Roe*? The answer takes us to an analysis of the relationship between autonomy and equality.

3. Autonomy, Abortion, and Equality

The Due Process Clause and its protection of "liberty" has become the textual source of unenumerated rights.⁹⁹ For autonomy theorists, "liberty" has come to mean "individual autonomy." Most autonomy theorists have come to believe that autonomy demands abortion rights. Indeed, some have gone so far as to argue that laws restricting abortion would strip women of their personhood.¹⁰⁰ The Due Process and Equal Protection Clauses are often viewed as "open-ended" provisions that implicitly grant the Supreme Court substantial authority to review state statutes.¹⁰¹ The

94. See *Casey*, 505 U.S. at ___, ___, 112 S. Ct. at 2807-08, 2810-11.

95. See *id.* at ___, 112 S. Ct. at 2817.

96. *Id.* at ___, 112 S. Ct. at 2806 (Adjudication of substantive due process claims necessarily involves "reasoned judgment.").

97. *Id.* at ___, 112 S. Ct. at 2814 ("[A] decision without principled justification would be no judicial act at all.").

98. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 YALE L.J. 1501, 1539 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)).

99. U.S. CONST. amend. XIV.

100. See, e.g., ROSALIND PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 346 (rev. ed. 1990); LAURENCE H. TRIBE, *ABORTION* 128 (1990) (granting fetal personhood "makes the woman less than a full person").

101. U.S. CONST. amend. XIV.

Court's discretion under modern substantive due process analysis largely consists of determining which unenumerated liberty interests should be deemed "fundamental rights." The Court's discretion under the Equal Protection Clause is exercised in determining which legislative classifications merit heightened judicial scrutiny. The Court has sometimes exercised a due process-like review in equal protection cases by applying strict scrutiny based on the fundamental nature of the right infringed, rather than based upon the suspect nature of the legislative classification. Thus, the Court in *Skinner v. Oklahoma*¹⁰² purported to invalidate a sterilization law based on an irrational legislative classification; at the same time, the Court claimed to apply strict scrutiny because the law "involves one of the basic civil rights of man."¹⁰³

Similarly, in *Eisenstadt v. Baird*,¹⁰⁴ a four Justice majority invalidated an anticontraceptive measure purportedly based on the irrationality of the legislative classifications, while claiming to avoid the decision of whether the liberty interest of an individual in using contraception was a fundamental right.¹⁰⁵ The rational basis equal protection analysis employed in *Eisenstadt* was functionally similar to strict scrutiny because the four Justice majority placed an unusually high burden on the State to demonstrate the means-end fit. Generally, the *Eisenstadt* Court appeared to substitute its own view of "rationality" for that of the legislature, thus echoing the tendency of the *Lochner*¹⁰⁶ era substantive due process cases to employ an extremely strict "rationality" level of review.¹⁰⁷

The Court has thus evidenced a marked tendency to use the Equal Protection Clause to perform, in a sometimes hidden way, the substantive due process function of protecting unenumerated fundamental rights. Equality, in other words, has been used to serve the cause of protecting liberty. Autonomy theorists, who believe that "liberty" means "autonomy," have thus wished to use "equality" as a means of protecting "autonomy."

102. 316 U.S. 535 (1942).

103. *Id.* at 541.

104. 405 U.S. 438 (1972).

105. *Id.* at 446-55. The four Justice opinion is a "majority" because two Justices, Rehnquist and Powell, did not participate in the decision. *Id.* at 455. Justice White concurred in the result, and did not reach the issue of whether a distinction in contraception legislation between the married and unmarried is constitutionally permissible. *Id.* at 460-65 (White, J., concurring).

106. *Lochner v. New York*, 198 U.S. 45 (1905).

107. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 761 (4th ed. 1991) (*Eisenstadt* majority claimed to employ the traditional equal protection standard of review but nonetheless "clearly employed some form of independent judicial scrutiny."). Thus, Chief Justice Burger's dissent complained that the four Justice majority and Justice White's concurrence "seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process." *Eisenstadt*, 405 U.S. at 467.

Generally, however, the grand theme of equality for the Court has been the protection of racial equality. The Court's great act in interpreting the Equal Protection Clause has been its determination that "separate but equal" is not equal, regardless of what the framers and ratifiers of the Fourteenth Amendment may have intended.¹⁰⁸ The continuing struggle to interpret, apply, and enforce the principle of racial equality has apparently made the Court less inclined to use the Equal Protection Clause as an open-ended invitation to social engineering in other areas. The Court has declared few classifications, outside those of race, as suspect.¹⁰⁹ Its extensive case law in the area of race, with its complicating issues of affirmative action¹¹⁰ and the proper scope of remedying de jure segregation,¹¹¹ has led to some rules that actually limit the scope of review under the Equal Protection Clause. Liti-gants, for example, must prove that a law is intentionally discriminatory; the mere existence of discriminatory effect is insufficient.¹¹² The Court's protection of racial equality has consumed and limited its protection of equality in almost the same way that its protection of abortion has consumed and limited its protection of privacy.¹¹³

108. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court purported to invalidate separate but equal only in the realm of public education. The Court's subsequent invalidations of other applications of separate but equal on the authority of *Brown* are usually accepted as suggesting that *Brown* is the basis for a general abandonment of separate but equal.

109. Racial minorities and national origin currently enjoy the status of being suspect classes. See NOWAK, *supra* note 107, at 576. The Court has described alienage as a suspect class, but the review is apparently not as strict as for racial minorities and national origin, and different standards of review are applied dependent on the characteristics of the law. *Id.* at 576, 702-16. Classifications based on gender and illegitimacy are also subject to heightened review, sometimes referred to as intermediary scrutiny. See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988); *Craig v. Boren*, 429 U.S. 190 (1976).

110. See generally *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *University of Cal. v. Bakke*, 438 U.S. 265 (1978).

111. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 493 U.S. 33 (1990); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley (I)*, 433 U.S. 267 (1977); *Milliken v. Bradley (II)*, 418 U.S. 717 (1974), *aff'd*, 433 U.S. 267 (1977); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

112. *Washington v. Davis*, 426 U.S. 229 (1976).

113. This is not meant as a criticism of the Court's equal protection jurisprudence. The application of the equality principle to the states through the Fourteenth Amendment was motivated primarily by the need of the national government to protect the former slaves; it therefore makes sense to make racial equality the preeminent concern in defining the doctrine of equality. The Court's substantial investment of its limited legitimacy in the creation and enforcement of a broad

The doctrinal limitations of the Equal Protection Clause have frustrated those who wish to use it to support broad abortion rights. First, the Court has refused to consider abortion restrictions as evidence of discriminatory intent or as violative of equal protection.¹¹⁴ Even if abortion restrictions have the effect of disadvantaging women, such an effect would be insufficient to constitute a violation of the Equal Protection Clause.¹¹⁵ Second, the Court has held that gender discrimination demands only intermediate scrutiny, under which it upholds discriminatory statutes that are substantially related to the achievement of important governmental objectives.¹¹⁶ In *Roe*, the Court held that the state has an "important and legitimate interest" in protecting fetal life which grows "in substantiality" throughout pregnancy.¹¹⁷ Thus a statute, such as an abortion prohibition, which substantially served the state's "important" interest in fetal life should be upheld under intermediate scrutiny, even if the Court found such statute to be discriminatory in intent.

Despite these doctrinal barriers, Justice Blackmun's opinion in *Casey* proposed an explicit grounding for the abortion right in the Equal Protection Clause.¹¹⁸ Justice Blackmun's dissent in *Webster v. Reproductive Health Services*¹¹⁹ had rhetorically embraced the argument that abortion rights are necessary to women's equality, while refraining from a textual or doctrinal reliance on the Equal Protection Clause:

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the

abortion right, however, cannot be similarly justified. Abortion rights represent a distortion, rather than a validation, of the constitutional principles represented by the right of privacy.

114. See *Harris v. McRae*, 448 U.S. 297, 322-23, 323 n.26 (1980); *Maher v. Roe*, 432 U.S. 464, 469-71 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 66-67 (1976).

115. See, e.g., *Washington*, 426 U.S. 229.

116. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

117. *Roe v. Wade*, 410 U.S. 113, 162-63 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992). The joint opinion in *Casey* stated that "*Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.'" *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791, 2817 (1992).

118. See *Casey*, 505 U.S. at ___, 112 S. Ct. at 2846-47 (Blackmun, J., concurring in part and dissenting in part).

119. 492 U.S. 490 (1989).

full participation of women in the economic and political walks of American life.¹²⁰

The joint opinion in *Casey*, in discussing reliance on *Roe*, echoed Justice Blackmun's *Webster* dissent:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.¹²¹

The joint opinion further relied on gender equality themes in its affirmation of the abortion right as a Fourteenth Amendment "liberty"¹²² and in its invalidation of Pennsylvania's spousal notification law.¹²³ The joint opinion failed to specifically cite the Equal Protection Clause, but broadly spoke of a constitutional understanding of marriage, the family, and the individual.¹²⁴ It was clear that gender equality concerns and an emphasis on individual autonomy were prominent elements of their constitutional vision of the family.¹²⁵

Justice Blackmun, the authors of the joint opinion, and a number of academics are essentially asserting that women need legal access to elective abortion in order to be equal to men. This view is so strongly held that it is considered virtually axiomatic. Thus, Professor Tribe has declared that "[l]aws restricting abortion so dramatically shape the lives of women, and only of women, that their denial of equality hardly needs detailed elaboration. While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women."¹²⁶ Autonomy theorists, in other words, believe that women need broad abortion rights in order to be *equally autonomous*.

To autonomy theorists, a denial of equal autonomy is a serious matter, given that individual autonomy is held as the highest value, and the very criterion of human personhood. The premise that abortion rights are necessary to *equal* autonomy explains why most autonomy theorists balance the conflict between the fetus and the woman as they do, despite the plausibility

120. *Id.* at 557 (Blackmun, J., dissenting).

121. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2809.

122. *See Casey*, 505 U.S. at ___, 112 S. Ct. at 2807.

123. *See id.* at ___, 112 S. Ct. at 2830-31.

124. *Id.*

125. *See id.*

126. TRIBE, *supra* note 28, at 105.

of views that severely restrict abortion rights in the interest of fetal autonomy and survival. The elaborate defense of *Roe* in terms of inherent and relational fetal characteristics is not adopted because it is compelling; rather, it is adopted as the most plausible means of resolving the fetal/female conflict in a manner that will create gender equality.

One root of *Roe*, then, is the premise that women need abortion rights to be equally autonomous to men. As a preliminary matter, one could dispute that individual autonomy is the principal meaning of liberty. Putting this question temporarily aside, one can seriously question the axiom that abortion rights are necessary to equal autonomy. Like many abstract propositions, this one can be usefully analyzed in the context of a specific dispute: In this case the one posed by federal intervention to assure access to abortion facilities.

4. Equal Autonomy, the Klan Act, and Operation Rescue

It is entirely fitting that *Bray v. Alexandria Women's Health Clinic*,¹²⁷ one of the two primary abortion-related cases before the Court in the October 1991 Term, directly posed the question of whether "opposition to abortion [is] per se discrimination against women for purposes of the 'class animus' requirement of 42 U.S.C. § 1985(3)?"¹²⁸ *Bray* was argued shortly before the confirmation of Justice Clarence Thomas, and the eight member Court was apparently unable to resolve the case.¹²⁹ Therefore, *Bray* was reargued early in the October 1992 Term and finally decided in January 1993. The dispute whether the Civil Rights Act of 1871¹³⁰ gives federal courts jurisdiction to intervene against Operation Rescue "conspiracies" achieved national prominence with Judge Patrick Kelly's assertion of that jurisdiction in Wichita, Kansas.¹³¹ The Supreme Court had already accepted *Bray* when the Wichita controversy brought the role of federal judges in these cases into public scrutiny.

It is a common misunderstanding to view Judge Kelly, or other similarly situated judges, as using the Klan Act as a means of enforcing the abortion right against the actions of Operation Rescue. It is true that under the Klan Act judges are given jurisdiction to enjoin certain infringements of

127. 113 S. Ct. 753 (1993).

128. Petition for Writ of Certiorari at (i), *Bray*, 113 S. Ct. 753.

129. See *Bray*, 113 S. Ct. at 758. The order did not give a reason for restoring the case to the calendar for reargument, but the most obvious rationale would be that the eight person court was deadlocked.

130. Civil Rights Act of 1871, 17 Stat. 13 (current version 42 U.S.C. § 1983 (1988)).

131. See, e.g., *Women's Health Care Servs. v. Operation Rescue*, No. 91-1303-K, Aug. 27, 1991 (Memorandum Opinion of District Judge Patrick Kelly).

constitutional rights. However, Supreme Court precedent, and most lower court decisions, appear to agree that Fourteenth Amendment rights, such as the abortion right, can only be asserted against state actors. Thus, the Klan Act generally cannot be used as a basis for protecting the abortion right from the activities of Operation Rescue, an association of private individuals.¹³² The actual right supposedly protected by Judge Kelly and other federal judges has technically been the right of interstate travel, based on the allegation that some women travel interstate to receive abortion services at the target clinic.¹³³ Operation Rescue defendants and the Justice Department made the obvious argument that the right to travel cannot be stretched this far, and the Supreme Court ultimately agreed.¹³⁴

Operation Rescue defendants also raised an issue under the Klan Act that ideologically and rhetorically attacks the core of the abortion rights position. The second of five questions that the Operation Rescue petitioners posed in *Bray* was whether "opposition to abortion [is] per se discrimination against women for purposes of the 'class animus' requirement of 42 U.S.C. § 1985(3)?"¹³⁵ The intensely ideological issue of whether opposition to abortion is antifemale arises out of the Supreme Court's holding that Section 1985(3) claims require proof of a conspiracy "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."¹³⁶ This requires that the conspiracy be "motivated by a specific class-based, invidiously discriminatory animus."¹³⁷

The extensive district court findings in *Bray* stated that the defendants believe that abortion is child-killing and conspired in order to save the lives of fetuses and reverse the legalization of abortion.¹³⁸ The named Operation

132. See, e.g., *United Bhd. of Carpenters & Joiners Local 610 v. Scott*, 463 U.S. 825 (1983); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *NOW v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd in part, rev'd in part*, 919 F.2d 857 (3d Cir. 1990); *Chico Feminist Women's Health Ctr. v. Butte Glenn Medical Soc'y*, 557 F. Supp. 1190 (E.D. Cal. 1983). *Contra Lewis v. Pearson Found., Inc.*, 908 F.2d 318 (8th Cir. 1990). See also *Bray*, 113 S. Ct. at 764.

133. *Women's Health Care Servs.*, *supra* note 132; *Bray*, 113 S. Ct. at 762.

134. See generally Brief of Petitioners, *Bray*, 113 S. Ct. 753.

135. Petition for Writ of Certiorari, at (i), *Bray*, 113 S. Ct. 753.

136. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971) (quoting 42 U.S.C. § 1985(3) (1988)).

137. See *NOW*, 726 F. Supp. at 1492 (quoting *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)); see also *United Bhd. of Carpenters*, 463 U.S. at 834-35 (requirement of class-based, invidiously discriminatory animus critical to ensure that 42 U.S.C. § 1985(3) does not become a general federal tort law).

138. See *NOW*, 726 F. Supp. at 1487-90.

Rescue petitioner in *Bray* was a woman. The Supreme Court therefore was asked whether a woman who conspires to block abortion facilities out of a sincere desire to stop what she views as "child-killing" is actually motivated, as a matter of law, by an invidious intent to subjugate or discriminate against women. In Klan Act analysis, as in Equal Protection analysis, the law's requirement of discriminatory *intent* makes it very difficult for autonomy theorists to prove inequality. Justice Scalia's majority opinion in *Bray* forthrightly rejected the equation of anti-abortion motivation with antifemale animus:

Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of petitioners' unlawful demonstrations.¹³⁹

Justice Scalia further rejected the implicit comparison of anti-abortion activists with racists:

The nature of the "invidiously discriminatory animus" *Griffin* had in mind is suggested both by the language used in that phrase ("invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," Webster's Second International Dictionary 1306 (1954)) and by the company in which the phrase is found ("there must be *some racial, or perhaps otherwise class-based*, invidiously discriminatory animus," *Griffin*, 403 U.S. at 102 (emphasis added)). Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism. To the contrary, we have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, see *Maier, supra*, 432 U.S. at 474, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures, see *Harris, supra*, 448 U.S. at 325. This is not the stuff out of which a § 1985(3) "invidiously discriminatory animus" is created.¹⁴⁰

Justice Scalia's reminder that a moral and even legislative disfavoring of abortion is still "common," "respectable," "proper," and "reasonable," while a similar disfavoring based upon race is not, profoundly undermines

139. *Bray*, 113 S. Ct. at 760.

140. *Id.* at 761-62.

the abortion rights position. That position, as we shall see,¹⁴¹ rhetorically and logically requires that *Brown v. Board of Education*¹⁴² be generally acknowledged as analogous to *Roe*. If Operation Rescue activists are not Klansmen, but instead act from respectable motivations, then legal efforts to crush them cannot fairly be compared to Reconstruction era efforts to protect the rights of the freed slaves, or to post-*Brown* efforts to integrate the public schools. Indeed, the historical analogies from a pro-life perspective are reversed, with anti-abortion activists comparing themselves to the abolitionists and civil rights activists of these prior eras.

Justice Scalia's analysis to some degree avoids the issue of abortion and gender by refusing to automatically associate an anti-abortion attitude with any particular view of women. Justice Scalia is correct that persons with a variety of views of what facilitates gender equality oppose elective abortion, and thus is correct that the issues of abortion and gender equality should, as a matter of legal animus, be separated. On the other hand, from a rhetorical and political perspective it is important to note that pro-life activists generally link abortion to the issue of gender equality, but do so in a way precisely opposite to that articulated by abortion rights activists.

It will be surprising to some to realize that pro-life citizens, both female and male, typically perceive the view that women need abortion rights to be equal to men as profoundly antifemale and sexist. The following Section, adapted from the author's *amicus curiae* brief in *Bray*,¹⁴³ therefore attempts to articulate the commonly held pro-life view that it is the abortion rights position, rather than the anti-abortion position, that is antifemale.

5. The Antifemale Nature of Abortion Rights Arguments

The mere fact that women can become pregnant, and men cannot, does not in itself demonstrate that women need abortion in order to be equally autonomous to men. Initially, one might note that this capacity can be both a benefit and a burden. Although it is true that a man will never experience the burdens of being pregnant, it is equally true that a man will never experience the *benefits* of being pregnant. Men will never experience the joy, satisfaction, and bonding that carrying and birthing a child can produce. Difference does not in itself produce a conclusion regarding equality; the judgment of equality is rather a value determination.

141. See *infra* notes 255-315 and accompanying text.

142. 347 U.S. 483 (1954).

143. See generally *Amicus Curiae Brief of the Southern Center for Law and Ethics, Bray v. Alexandria Women's Health Clinic*, No. 90-985 (filed Apr. 9, 1991). This author was the author of the argument section of the brief; the counsel of record, Albert L. Jordan, along with others, edited the brief and participated in the writing of other sections of the brief.

Those who view abortion rights as necessary to gender equality are apparently unimpressed by the possibility that pregnancy and birth can offer unique benefits to women. For example, Professor Regan spends three pages describing the physical burdens of pregnancy.¹⁴⁴ He then acknowledges briefly that a *wanted* pregnancy may nonetheless be "worthwhile, or . . . a transcendent experience. . . ."¹⁴⁵ Regan denies the same possibility to an unwanted pregnancy.¹⁴⁶ Regan is obviously wrong in his assumption that a pregnancy that is unwanted, at a specific point in time, can never be experienced as ultimately worthwhile and even "transcendent." Indeed, the literature indicates that the majority of women who are denied an abortion eventually shift to a positive attitude toward their child that obliterates any differences between their attitudes and those of women with wanted pregnancies.¹⁴⁷

Moreover, Regan's focus on the physical burdens of pregnancy and birth misses the reality that most women who seek abortions apparently do so to avoid the *result*—a born infant at a certain time of their life—rather than to avoid the physical *process* of pregnancy and childbirth.¹⁴⁸ Yet, it is precisely this dissatisfaction with the result, the born infant, that is most apt to disappear if the abortion is denied.¹⁴⁹ Regan also appears to miss entirely the point that some women *physically* enjoy certain aspects of pregnancy, and even of birth. These miscalculations underscore Regan's complete failure to compare the burdens of pregnancy and birth to the male's loss at lacking any similar capacity. A man can *never choose to become pregnant and give birth*; a prohibition of abortion still leaves the female far ahead of the male in regard to choices concerning pregnancy and childbirth.

If you evaluate male sexuality from the perspective of female sexuality, it is entirely possible to conclude that the absolutely immutable male inability to conceive, bear, and birth new life renders him hopelessly inferior in both his reproductive capacity and his reproductive choices. The male function in the process of reproduction appears insignificant and replacea-

144. Regan, *supra* note 53, at 1579-82.

145. *Id.* at 1582.

146. *Id.* For example, Professor Regan states that "the question is not whether pregnancy is worthwhile, or whether it is a transcendent experience, for a woman who wants a child. The question is how burdensome it is for a woman who does *not* want a child." *Id.*

147. See HENRY P. DAVID ET AL., BORN UNWANTED: DEVELOPMENTAL EFFECTS OF DENIED ABORTION 77 (1988); Zdenek Dytrych et al., *Children Born to Women Denied Abortion*, 7 FAM. PLAN. PERSP. 165, 171 (1975).

148. See Aida Torres & Jacqueline D. Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 169 (1988).

149. See *supra* note 147 and accompanying text.

ble compared with the incomparably greater role of the female in conceiving, gestating, and birthing a human child.

However, the apparent desire of abortion rights advocates is to allow women to be *like men* in their sexuality. They apparently reason that because a man can engage in sexual intercourse without the risk of pregnancy, a woman, *in order to be equal to a man*, must be able to be as *nearly like a man* as possible in the ability to engage in childless sexuality. Access to legal abortion on demand is viewed as the necessary means to allow a woman to be *similar* to a man in order to be *equal* to a man.

This viewpoint takes the male as its model of human sexuality and then tries to attain equality for women by allowing them to act as male-like as possible. This viewpoint implies an inherent and natural inferiority of women in several ways. First, by attempting to make women like men, it assumes that male sexuality is inherently superior to female sexuality. Second, by focusing on the burdens of pregnancy and childbirth and by suggesting that they must be subject to elimination on demand, this perspective implies that the act of being pregnant relegates one to a position of inferiority. Being pregnant is apparently viewed as inferior because it is an intrinsically female state. The female's ability to become pregnant is viewed as rendering her actually or potentially inferior to a man, while a man's inability to become pregnant is viewed as rendering him actually or potentially superior.

To put the matter in blunt psychoanalytic perspective, it is implicit in the view of the abortion rights advocate that women must inherently suffer from "penis envy,"¹⁵⁰ while men can never legitimately suffer from "womb envy." It is therefore those who advocate the necessity of abortion rights for women, rather than those who oppose them, who actually possess an antifemale "animus."

The attempt to "equalize" women and men through abortion relegates women to perpetual inferiority. Women can never become completely male-like in their sexuality through the act of abortion. The price of attempting to become male-like through abortion, moreover, is high for many women. Reports gathered by neutral, abortion-rights, and pro-life researchers indicate that a significant percentage of women characterize their abortion as killing.¹⁵¹ For example, a 1989 national poll conducted by the

150. See Sigmund Freud, *Three Contributions to the Theory of Sex*, in BASIC WRITINGS OF SIGMUND FREUD 553, 595 (A. Brill ed. & trans., 1938).

151. See LINDA BIRD FRANCKE, THE AMBIVALENCE OF ABORTION 61, 64, 75, 84, 90, 99-100, 222, 235 (1978); DAVID C. REARDON, ABORTED WOMEN, SILENT NO MORE 79, 146, 149 (1987); MARY K. ZIMMERMAN, PASSAGE THROUGH ABORTION 194-95 (1977); George Skelton, *Most Americans Think Abortion is Immoral*, L.A. TIMES, Mar. 19, 1989, at 1.

Los Angeles Times found that one third of American women who had undergone an abortion agreed with the statement that "abortion is murder."¹⁵² For these women, the "equality" promised by abortion rights advocates is only possible by engaging in an activity subjectively defined as killing her own baby.

This difficulty is exacerbated by the fact that a majority of Americans characterize abortion as "murder."¹⁵³ Thus, if American national policy, as found in a congressional act or the Fourteenth Amendment, is premised on the view that women need abortion to be equal to men, the majority of Americans could reasonably interpret this policy to reflect the view that a woman needs the right to kill in order to be equal.

The apparent message of such a view is that a woman must be willing to bear the blood guilt of a Medea in order to be equal to a man. Because men do not need to make a sacrifice to attain intercourse without pregnancy, and because men remain the standard of equality, women are doomed to a perpetual inferiority in which they ever grope to be like men, never quite attaining it, but often confronted with cruel choices between equality and their conscience.

The equating of anti-abortion sentiment with antifemale animus absurdly labels the majority of American women as woman-haters. Opinion polls indicate that the majority of Americans, *including women*, believe that most abortions should be illegal.¹⁵⁴ Indeed, analysis of poll data reveals either that "[t]here is no gender gap on abortion,"¹⁵⁵ or that men, and especially single men, favor abortion rights more strongly than women.¹⁵⁶ It is an absurd result that the majority of persons of a protected class are viewed as possessing a discriminatory animus against themselves. Such a result essentially victimizes a class of persons in the name of protecting them. It is

152. See Skelton, *supra* note 151.

153. See Tamar Lewin, *Views on Abortion Are Sharply Split 16 Years After Supreme Court Ruling*, N.Y. TIMES, Jan. 22, 1989, at 21 (reporting that separate surveys in 1985 by Harris and New York Times/CBS News found that more than half of those questioned said that abortion is a form of murder); Skelton, *supra* note 151 (national survey finding that 57% of Americans agree with statement that "abortion is murder").

154. See Ethan Bronner, *Abortion/An American Divide*, BOSTON GLOBE, Mar. 31, 1989, at A1 (majority of both men and women in America favor ban on majority of abortions); Lewin, *supra* note 153, at 21 (majority of Americans accept legal abortion for "hard cases" but reject legal abortion merely because a woman is single, poor, or does not want more children); Torres & Forrest, *supra* note 148 (Hard cases account for small minority of abortions.).

155. GEORGE GALLUP, JR. & JIM CASTELLI, *THE PEOPLE'S RELIGION* 178 (1989).

156. See HYMAN RODMAN ET AL., *THE ABORTION QUESTION* 141-43 (1987) (men more favorable to abortion rights in most national polls); E.J. Dionne, Jr., *Poll on Abortion Finds the Nation is Sharply Divided*, N.Y. TIMES, Apr. 26, 1989, at A1 (single men "especially strongly in favor of choice").

equally absurd to view abortion restrictions as a means by which men subjugate women, when women support such restrictions as often, or more often, than do men.

It is worth remembering that the feminists of the nineteenth century were intensely anti-abortion, viewing abortion as a consequence of the degradation of women by men.¹⁵⁷ Moreover, these feminists endorsed the passage and enforcement of nineteenth century anti-abortion legislation.¹⁵⁸ In 1869, Dr. Clemence Lozier, a leading female physician in New York City and long-time president of the New York Suffrage Association, brought charges against an abortion-requesting couple. The feminist movement and popular press approved Dr. Lozier's anti-abortion actions.¹⁵⁹ This historic feminist anti-abortion position is continued today by only a minority of those who self-consciously consider themselves to be feminists.¹⁶⁰

Today, the feminist label has been largely usurped by those who strongly favor abortion rights. Contemporary anti-abortion women and men therefore usually do not use the term "feminist" to describe their beliefs; nonetheless, they generally believe that their own anti-abortion position is more consistent with the equal worth and dignity of women than is the position of the National Organization for Women. The issue today is not really about whether women are equal to men. Rather, the issue is the measure of that equality. The predominate pro-life position is that elective abortion is an attack upon all that is distinctively female about women. In the words of one female pro-life activist, abortion is "the rape of motherhood, of the gender, of the uterus, [and] of the womb."¹⁶¹

6. Autonomy, Equality, and Human Sexuality

Many will find the claim that abortion rights arguments are based on an antifemale bias as incredible. Justice Blackmun and many abortion rights advocates and theorists are doubtless sincere in their belief that abortion rights are necessary to the attainment of gender equality. The issue, however, is whether their view of gender equality is based on a male model of human sexuality that is inherently antifemale.

157. See, e.g., JAMES C. MOHR, *ABORTION IN AMERICA* 109-14 (1978).

158. See *id.* at 113.

159. *Id.*

160. The historic feminist anti-abortion position is represented in part today by a group calling itself Feminists for Life, which has submitted amicus curiae briefs in various abortion-related cases. Contemporary feminist pro-life authors include Lisa Sowle Cahill and Sidney Callahan. See, e.g., Lisa Sowle Cahill, *Abortion, Autonomy, and Community*, in *ABORTION AND CATHOLICISM: THE AMERICAN DEBATE* 85 (Patricia Jung & Thomas Shannon eds., 1988); Sidney Callahan, *Abortion & the Sexual Agenda*, *COMMONWEALTH*, Apr. 25, 1986, at 232.

161. See FAYE D. GINSBURG, *CONTESTED LIVES* 99 (1989).

The argument that abortion rights proponents are antifemale sounds rhetorical. However, the argument is no more rhetorical than the more familiar accusation that anti-abortion arguments are inherently antifemale. Those who bring anti-abortion activists into court on the grounds that they evidence antifemale animus,¹⁶² and are engaged in extortion and racketeering,¹⁶³ can hardly be heard to complain about motivational or rhetorical attacks.

Moreover, there is substantial evidence that the abortion rights community has very little interest in issues pertaining particularly to women, insofar as they involve women embracing, rather than rejecting, the female reproductive process.¹⁶⁴ Justice Scalia once accused Justice Brennan of choosing the unconventional over the conventional as "the constitutional imperative."¹⁶⁵ Where women follow the conventional path of childbirth and encounter legal obstacles profoundly affecting the life, health, and welfare of themselves and their children, the response of the autonomy-dominated legal professorate, and of the law generally, has been indifference.

A significant body of evidence exists which indicates that the process of birth is badly mishandled in America. Approximately one in four births in America currently involve major surgery in the form of a Caesarean section.¹⁶⁶ The American rate is many times higher than many Western European countries and significantly higher than the World Health Organization's estimate of the highest justifiable rate.¹⁶⁷ Thus, there are a minimum of 400,000 unnecessary Caesarean sections each year in America. Abortion rights advocates are aware that unnecessary Caesarean-sections constitute a tremendous physical and emotional burden for women, and present all of the difficulties associated with major surgery.¹⁶⁸ Indeed, it is

162. See, e.g., *NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

163. See *NOW v. Schiedler*, 765 F. Supp. 937 (N.D. Ill. 1991) (rejecting claim by NOW and abortion clinics that anti-abortion activists were engaged in extortion and racketeering), *aff'd*, 968 F.2d 612 (1992), *reh. denied*, 968 F.2d 631, *cert. pet. pending*.

164. See *infra* notes 166-96 and accompanying text.

165. *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).

166. RICHARD WERTZ & DOROTHY C. WERTZ, *LYING-IN, A HISTORY OF CHILDBIRTH IN AMERICA* 260 (expanded ed. 1989).

167. See World Health Organization, *Appropriate Technology for Birth*, *THE LANCET*, Aug. 24, 1985, at 436, 437. The "General Recommendations" of the WHO stated: "Countries with some of the lowest perinatal mortality rates in the world have caesarean section rates of less than 10%. There is no justification for any region to have a rate higher than 10-15%." *Id.*

168. See JACK A. PRITCHARD, M.D. ET AL., *WILLIAMS OBSTETRICS* 869 (17th ed. 1985) (maternal morbidity and mortality caused by cesarean birth itself is more frequent and morbidity more severe than following vaginal delivery). Planned Parenthood specifically cited the high cesarean rate and "higher risks of death and adverse health consequences" associated with

possible that as many women die due to unnecessary caesarean births as died from illegal abortions prior to *Roe v. Wade*.¹⁶⁹

Those who have written of this high Caesarean rate have often viewed it as symptomatic of a system that overmedicalizes the entire birth process at the expense of women and their families.¹⁷⁰ The American woman, from the time she enters the hospital, becomes the subject of a long series of intrusive and often painful medical interventions. The woman is often given an enema; she is shaved; an intravenous needle is stuck into her arm. She is forced to wear a revealing hospital gown, and is subjected to internal examinations by the staff of the hospital, whom she generally has never met.¹⁷¹ Often, the unnecessary use of monitoring equipment limits the woman's mobility, forcing her to endure labor in the most painful position—lying down on the bed. Thus, American women are often denied the tradi-

cesarean birth to support broad abortion rights in their brief in *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

169. Various sources estimate that the maternal death rate attributable to caesarean birth is two to six times higher than vaginal birth. See George L. Rubin et al., *Maternal Death After Cesarean Section in Georgia*, 139 AM. J. OBS. GYN. 681 (1981) (cesarean maternal mortality rate 105.3 per 100,000; 59.3 per 100,000 attributable to Cesarean birth itself; vaginal maternal mortality rate 9.7 per 100,000); see also CARL J. PAVERSTEIN, CLINICAL OBSTETRICS 887 (1987) (maternal mortality two to four times higher in cesarean birth); WERTZ & WERTZ, *supra* note 166, at 262 (maternal mortality four times higher in cesarean birth). Given a minimum of 400,000 unnecessary Caesareans per year, the higher rates found in the Georgia study (increment of approximately 50 maternal deaths per 100,000 Caesareans above that for vaginal births) would yield approximately 200 maternal deaths per year due to unnecessary Cesarean births. This figure may be artificially high. Nonetheless, it appears likely that at least 50 American women die each year due to unnecessary Caesareans.

Official statistics indicate that in the year prior to *Roe* there were 70 deaths associated with all abortions, both legal and illegal. See VITAL STATISTICS OF THE UNITED STATES, 1960-77, reprinted in Thomas W. Hilgers & Dennis O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in NEW PERSPECTIVES ON HUMAN ABORTION 80 (Thomas Hilgers et al. eds., 1981). There are multiple reasons to believe that the popularized view that 5,000 to 10,000 women died each year from illegal abortions was a gross distortion. Mary Calderone, M.D., then Medical Director of Planned Parenthood, estimated in a 1960 article that 260 maternal deaths were attributable to both legal and illegal abortions in 1957. See Mary S. Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948 (1960). It appears that the major causes of the decline of abortion-related maternal mortality has been technological, rather than legal. See *id.* (attributing decline in abortion-related maternal mortality in part to antibiotics); Hilgers & O'Hare, *supra*, at 90 (Legalization did not lower maternal mortality rate but merely shifted mortality from illegal to legal abortions.).

170. See, e.g., WERTZ & WERTZ, *supra* note 166, at 257-63.

171. See, e.g., SUSAN MCCUTCHEON-ROSEGG, NATURAL CHILDBIRTH THE BRADLEY WAY 130-31, 223-24, 211-12, 222 (1984) (noting and criticizing hospital routines including intravenous needle, enema, shave, and required use of hospital gown); BEVERLY SAVAGE & DIANA SIMKIN, PREPARATION FOR BIRTH 194-97 (1987) (noting and criticizing routine use of intravenous needle, enema, and shave); DAVID STEWART, THE FIVE STANDARDS FOR SAFE CHILDBEARING 390-91 (1981) (noting and criticizing routine use of intravenous needle).

tional practice of coping with labor pain through walking, bathing, standing, and other forms of movement.¹⁷² Although lying down can actually slow labor,¹⁷³ the American woman nonetheless is kept to the time schedule of the "average" woman. If her labor does not progress according to average rates, she is treated as abnormal and subjected to additional interventions.¹⁷⁴ The physician may artificially rupture the amniotic membranes (amniotomy) in order to hasten labor.¹⁷⁵ In addition, pitocin, an artificial labor stimulant, may be used. This necessitates insertion of the intravenous needle. The use of this artificial labor stimulant necessitates careful monitoring of the fetus and of labor, requiring the insertion, into the woman's body, of internal monitoring devices. Artificially stimulated labor is often more painful for the woman, as well as being more stressful for the fetus. Natural labor contractions pass through the uterus in waves; artificially-stimulated contractions can involve the simultaneous contraction of the entire uterus.¹⁷⁶ Once an artificial stimulant is used, the time available to the woman is shortened, as a Caesarean delivery is indicated if vaginal birth does not follow within several hours.¹⁷⁷ Even if a woman escapes Caesarean birth, most American women are subjected to automatic episiotomy, involving the surgical enlargement of the vaginal opening. The episiotomy means that the woman will experience soreness and difficulty in sitting for some days after birth and will be subject to the risk of various complications, including infection. Routine episiotomies are widely viewed as an

172. See WERTZ & WERTZ, *supra* note 166, at 257-60 (fetal heart monitor has become routine in American birth, even though it is unnecessary, limits mobility of laboring women, and contributes to higher cesarean rates; internal monitor may force woman into lithotomy position); AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Intrapartum Fetal Heart Rate Monitoring, Technical Bulletin No. 132*, Sept. 1989 (rejecting view that continuous electronic fetal monitoring is superior to intermittent auscultation); ADRIENNE B. LIEBERMAN, EASING LABOR PAIN 119-24, 190-91 (1987) (lying in bed during labor increases pain and lengthens labor; walking and vertical position during labor shortens labor, reduces pain and need for medication, and is better for baby; fetal monitoring immobilizes women); SAVAGE & SIMKIN, *supra* note 171, at 100 (1987) (Supine position can be "excruciating" during labor, yet many women report being forced to lie in this position during labor; discussing immobilization of women caused by monitoring.).

173. LIEBERMAN, *supra* note 172, at 119-20; STEWART, *supra* note 171, at 390-91 (medical interventions, including immobilization on bed, is major cause of prolonged or protracted labor).

174. See WERTZ & WERTZ, *supra* note 166, at 261.

175. See LIEBERMAN, *supra* note 172, at 191-92 (discussing contrasting views of safety and effectiveness of amniotomy); SAVAGE & SIMKIN, *supra* note 172, at 175 (if labor fails to progress satisfactorily, doctor may rupture membranes); STEWART, *supra* note 171, at 212-13 (arguing that amniotomy is overused and risky).

176. See LIEBERMAN, *supra* note 171, at 192-93 (Pitocin labor must be closely monitored), SAVAGE & SIMKIN, *supra* note 171, at 185-87 (Pitocin-induced contractions more painful and created greater risks for unborn child.); STEWART, *supra* note 171, at 211-13 (1981) (criticizing overuse of IV's and oxytocin).

177. J. PRITCHARD ET AL., WILLIAMS OBSTETRICS 645 (17th ed. 1985).

unnecessary source of pain and complications by a variety of childbirth educators.¹⁷⁸

American women who wish a less medicalized birth, and a lower chance of Cesarean delivery, often desire the option of choosing a midwife as the primary care provider, and sometimes desire the less medicalized, more woman-centered environment of the home. Some women prefer a birth center, which generally involves primary care by a nurse-midwife. Recent medical literature indicates that for most women a planned home birth assisted by an experienced midwife is just as safe as a physician-assisted hospital birth.¹⁷⁹ Similarly, the medical literature has indicated that outcomes are improved within a hospital setting where midwives, rather than physicians, are the primary health care providers. Not surprisingly, medical interventions in general, and Cesarean births in particular, are less frequent when the primary care provider is a midwife, whether the birth occurs in a hospital, birth center, or home.¹⁸⁰

The law in many states has severely restricted the options available to women. Many states overregulate nurse-midwifery and prohibit traditional midwifery, making it difficult to legally give birth at home or find a birth setting appreciably less medicalized than physician-assisted hospital birth.¹⁸¹ Overregulation and prohibition of midwifery has made it more difficult for women to find midwives, destroyed midwife-based efforts to train, license, and regulate one another, and interfered with the smooth facilitation of backup physician and hospital services. In some instances, states containing numerous counties with no available hospitals and no available physicians have nonetheless overregulated or prohibited midwifery, leaving rural women with no prenatal and birthing care within a reasonable distance of their homes.¹⁸²

178. McCUTCHEON-ROSEGG, *supra* note 171, at 189.

179. See JUDY B. LITOFF, AMERICAN MIDWIVES 146-47 (1978); WERTZ & WERTZ, *supra* note 166, at 283-89 (summarizing studies); G. David Adamson & Douglas J. Gare, *Home or Hospital Births?*, 243 JAMA 1732 (1980); Claude A. Burnett et al., *Home Delivery and Neonatal Mortality in North Carolina*, 244 JAMA 2741 (1980); Lewis Mehl et al., *Outcomes of Elective Home Births: A Series of 1,146 Cases*, 19 J. REPROD. MED. 281 (1977).

180. See Barry S. Levy et al., *Reducing Neonatal Mortality Rate With Nurse-Midwives*, 109 AM. J. OB. GYN. 50 (1971); see also WERTZ & WERTZ, *supra* note 166, at 285-86 (Midwife-assisted birth at birth centers produces lower rates of caesareans and other medical interventions.).

181. See LITOFF, *supra* note 179, at 145-46; Bonnie J. Butter & Irene H. Kay, *State Laws and the Practice of Lay Midwifery*, 78 AM. J. PUB. HEALTH 1161 (1988); Charles Wolfson, *Midwives and Home Birth: Social, Medical, and Legal Perspectives*, 37 HASTINGS L.J. 957-60 (1986) (appendix including state by state summary of legal status of lay midwifery); Noralyn O. Harlow, Annotation, *Midwifery: State Regulation*, 59 ALR 4th 929 (1988).

182. See, e.g., Brief of Plaintiff-Appellees, Cross-Appellants, Peckmann v. Thompson, Nos. 90-3334 and 90-3445, United States Court of Appeals for the Seventh Circuit, at 37 (citing Man-

The legal issues posed by natural childbirth would seem to parallel, as a matter of individual choice and women's health, the issue of abortion. The response of the legal professorate, however, has been almost complete indifference. This indifference is best exemplified by the casebooks published in the field of health law. These casebooks typically contain a chapter on the legal issues posed by human reproduction, which invariably cover contraception, sterilization, abortion, tort actions for wrongful birth, and alternative reproductive technologies such as surrogacy, artificial insemination, and in vitro fertilization. *Law, Science, and Medicine*, authored by Judith Areen, Patricia King, Steven Goldberg, and Alexander Capron, contains not a *single reference*—not *one word*—on midwifery, or the right of women to make choices regarding the process of normal childbirth. *Health Law*, by Barry Furrow, Sandra John, Timothy Jost, and Robert Schwartz, omits the topic entirely from their chapter on "Human Reproduction and Birth." An earlier chapter on "Regulating the Quality of Health Care" contains a four-page presentation of a case holding that an Illinois act prohibiting the unlicensed practice of midwifery is unconstitutionally vague as applied to a midwife defendant.¹⁸³ An additional page of the text contains three brief "notes." The third note discusses the application of the right of privacy to midwifery; the note cites cases dismissing this claim, and then cites a series of law review articles.¹⁸⁴ *Health Law's* brief treatment of midwifery suggests that it is an unimportant issue more relevant to the specialized issue of licensing than to the broader issue of control of reproduction.

The failure of leading casebooks to adequately cover the issues posed by natural birth and midwifery cannot be explained by a lack of law. Virtually every state has statutes, regulations, and case law relevant to these issues. Moreover, such state regulation has been summarized and discussed in ALR volumes, law reviews, and health-orientated journals.¹⁸⁵ The casebooks' extensive coverage of the legal issues concerning America's 1.6

agement Audit, Availability of Obstetric Care in Illinois, Office of the Auditor General, State of Illinois at 1, 2, 13, 17, 37-38, 47, 51) (Illinois' efforts to outlaw midwifery are irrational where 46 Illinois counties lack any obstetrical care; 40 counties lack a hospital maternity ward; and one-fourth of Illinois counties are without any physician who will provide prenatal care and delivery services for medicaid recipients); Janet Howard, *33% of Alabama Moms Miss Out on Prenatal Care*, BIRMINGHAM POST-HERALD, Sept. 10, 1992, at A1 (maternal delivery services available in only 38 of 67 counties in Alabama in 1990).

183. See BARRY FURROW ET AL., *HEALTH LAW* 58-62 (2d ed. 1991).

184. *Id.* at 62.

185. See *supra* note 181.

million annual abortions and much smaller number of surrogate births, eclipse the legal issues posed by America's four million annual births.¹⁸⁶

This lack of interest in women's control over the process of birth is paralleled in judicial decisions which have rejected the claim that the constitutional right of privacy protects the rights of women and families to employ midwives. For example, in *Bowland v. Municipal Court*, the California Supreme Court, sitting en banc three years after *Roe*, unanimously rejected a midwifery privacy claim.¹⁸⁷ The court explained that "the right of privacy has never been interpreted so broadly as to protect a woman's choice of the manner and circumstances in which her baby is born."¹⁸⁸

The court's implicit statement that the right to abort is narrower than the right to choose the "manner and circumstances" of birth is illogical. Both undergoing an abortion and employing a midwife are choices concerning childbirth. If the privacy right, as the Court has stated, protects such choices, it would be natural to assume that abortion and midwifery are equally broad applications of the privacy right. One could also argue that recognizing the right to choose whether to *give birth* implicitly grants the right to control the *process* of birth. Thus, *Roe* could be viewed as a broader application of the privacy right.

In addition, the Supreme Court, as early as 1980, acknowledged that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."¹⁸⁹ Midwifery, by contrast, has a safety record better, equal, or nearly equal to that of obstetrics,¹⁹⁰ and certainly cannot be viewed as inherently destructive of the fetus. To many, the inherent destructiveness of abortion suggests that the abortion right is a much broader right than a midwifery right. If a woman can hire a doctor to purposefully terminate the life of her fetus, why is she precluded from hiring a midwife to help her give birth, and continued life, to that fetus?

The California Supreme Court went so far as to imply that the legislature might legitimately require women to "give birth in a hospital or with a physician in attendance," and in any event could achieve substantially the same result by forcing the woman to choose between such an option and

186. See ECONOMICS AND STATISTICS ADMINISTRATION—U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES 62 (11th ed. 1991) (4,021,000 births in 1989).

187. 556 P.2d 1081 (Cal. 1976) (en banc).

188. *Id.* at 1089.

189. *Harris v. McRae*, 448 U.S. 297, 325 (1980).

190. See *supra* note 179 and accompanying text.

self-delivery.¹⁹¹ The plaintiffs' claims that home birth was safe were summarily rejected as "more properly addressed to the Legislature."¹⁹²

The willingness to consider facts significant to the relevant constitutional test is basic to the judiciary's functioning. In the area of abortion, the Court has repeatedly based its decisions on medical evidence relating to, for example, the relative safety of childbirth and abortion, or the relative safety of clinic and hospital abortions.¹⁹³ In *Planned Parenthood v. Casey*,¹⁹⁴ the Court relied on findings of fact, expert testimony, and published studies regarding the battered woman syndrome to evaluate the constitutionality of Pennsylvania's spousal notification law.¹⁹⁵ If choices concerning the manner and circumstances of birth were recognized as within the privacy right, the means-end strict scrutiny inquiry would require courts to analyze whether midwifery restrictions actually serve the purported state interests in maternal, fetal, and neonatal life and health. The refusal to review midwifery and home birth safety statistics constitutes the abandonment of judicial review in an area of reproductive choice. Regrettably, the California Supreme Court's rejection of choice in childbirth has been followed by the state supreme courts of Missouri, Massachusetts, and Colorado.¹⁹⁶

The judicial abandonment of a constitutional role in midwifery and women's control over childbirth, contemporaneous with its constitutional activism in abortion, constitutes an arbitrary constitutional favoritism, as Justice Scalia described it, for the unconventional. Autonomy theory should equally protect both the conventional choice to give birth and the unconventional choice to abort. In the real world, however, autonomy theorists, judges, and academics have had little interest in helping women to control and humanize the inherently female process of birth. Instead, they have concentrated on freeing women from that process. The apparent basis

191. *Bowland*, 556 P.2d at 1089.

192. *Id.*

193. See *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 428-39 (1983); *Roe v. Wade*, 410 U.S. 113, 149, 163 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992). It has been argued that the Supreme Court has mishandled the medical evidence in the abortion context. The relevant point here, however, is that once a fundamental right is recognized, the Court must, under the means-end test, evaluate whether state regulations truly serve the state's asserted interests in health and safety.

194. 505 U.S. ___, 112 S. Ct. 2791 (1992).

195. See *id.* at ___, 112 S. Ct. at 2826-28.

196. See *People v. Rosburg*, 805 P.2d 432, 437 (Colo. 1991) (right of privacy does not include personal choice of whether to utilize a lay midwife to assist in childbirth); *Leigh v. Board of Registration in Nursing*, 506 N.E.2d 91, 94 (Mass. 1987) (right of privacy does not include the right to choose the manner and circumstances in which a woman's baby is born); *State ex rel. Mo. State Bd. of Regulation for the Healing Arts v. Southworth*, 704 S.W.2d 219 (Mo. 1986) (en banc).

for this preference is an antifemale bias, in the sense that inherently female processes such as birth are considered so unimportant, and so demeaning, that the primary and burning issue is how they can be avoided.

7. Parental Rights and Autonomy Theory

Privacy's arbitrary constitutional preference for the unconventional is also illustrated by the Court's treatment of parental rights. During the 1920s, the Supreme Court decided four cases invalidating state restrictions on education. These substantive due process cases enunciated and applied the principle that parents possess a substantial interest in controlling the education and upbringing of their children. Thus, in *Meyer v. Nebraska*¹⁹⁷ and *Bartels v. Iowa*,¹⁹⁸ the Supreme Court invalidated laws forbidding the teaching of foreign languages prior to the ninth grade. In *Pierce v. Society of Sisters*, the Court invalidated a law requiring attendance at public school.¹⁹⁹ Finally, in *Farrington v. Tokushige*, the Court invalidated regulation of private schools that was so extensive as to "affirmative[ly] direct . . . the intimate and essential details of [private] schools . . . [thereby] deny[ing] both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books."²⁰⁰ The modern Court, and autonomy theorists such as Professor Tribe, repeatedly cite these cases to demonstrate the age, and hence legitimacy, of privacy rights.²⁰¹

A substantial amount of litigation has occurred in the last twenty-five years concerning home schooling and the state's role in regulating private schools.²⁰² Despite a large body of contradictory statutory, administrative,

197. 262 U.S. 390 (1923).

198. 262 U.S. 404 (1923).

199. 268 U.S. 510 (1925).

200. 273 U.S. 284, 298 (1927).

201. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (citing *Pierce* and *Meyer* to support proposition that "[o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government); TRIBE, *supra* note 28, at 92 (defending privacy right from charge that Blackmun invented it in *Roe* by citing *Meyer* and *Pierce* as 1920s privacy cases).

202. See, e.g., *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Duro v. District Att.*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980), *Care and Protection of Charles*, 504 N.E.2d 592 (Mass. 1987); *Sheridan Rd. Baptist Church v. Michigan Dept. of Educ.*, 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987); *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985); *State v. Edgington*, 663 P.2d 374 (N.M. 1983), *cert. denied*, 464 U.S. 940 (1983); *State v. Schmidt*, 505 N.E.2d 627 (Ohio 1987), *cert. denied*, 484 U.S. 942 (1987); *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976); *State v. Riddle*, 285 S.E.2d 359 (W.Va. 1981).

and case law,²⁰³ the only case the Court has chosen to hear is *Wisconsin v. Yoder*, the 1972 decision permitting Amish children to leave school and cease formal academic education after the eighth grade.²⁰⁴ Chief Justice Burger's majority opinion in *Yoder* can be, and has been, read to limit parental rights over education largely to the Amish.²⁰⁵ The failure of the Court to apply *Meyer* and the Free Exercise Clause to other educational settings has led to numerous holdings restricting parental rights, as judges read the Justices' silence, in combination with dicta in *Yoder* to indicate that the right in question is narrow and weak.

Indeed, the dicta of the last twenty years concerning parental authority over education has been devastating. In *Yoder*, the Court stated that courts "are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."²⁰⁶ In education, as in midwifery, effective judicial review requires that the judiciary carefully examine whether a state's regulatory scheme truly serves the state's compelling interests. A statement that the Court generally will defer to the legislature on the question of the "necessity" of a regulation represents the abandonment of judicial review. The Court, as long as abortion has been a fundamental right, has generally not deferred to the legislature's claim that a certain regulation served compelling state interests. Legislative claims regarding the educational necessity of a regulation are not intrinsically less susceptible to judicial review than legislative claims regarding the medical necessity of regulation.

The Court's denigration of its role in evaluating the fit of regulatory means and ends has been matched by denigration of the right itself. The majority has stated that *Pierce* lends "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society. . . ."²⁰⁷ This dicta dismisses parental views of education as idiosyncratic and implies that the state has no special burden to

203. A relatively dated summary on home schooling can be found in James W. Tobak & Perry A. Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1 (1982). Christopher Klicka of the Home School Legal Defense Association has prepared a more recent summary of home schooling law. See generally CHRISTOPHER J. KLIKA, HOME SCHOOLING IN THE UNITED STATES: A STATUTORY ANALYSIS (1989).

204. 406 U.S. 205 (1972).

205. See *id.* at 215-16, 234-36 (emphasizing unique claims of Amish); *Jernigen v. State*, 412 So.2d 1241 (Ala. Ct. App. 1982) (distinguishing *Yoder* based on Supreme Court's discussion of the Amish religion and way of life.).

206. *Yoder*, 406 U.S. at 235.

207. *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (quoting *Yoder*, 406 U.S. 205, 239 (White, J., concurring)).

meet in overcoming parental wishes. Generally, when a fundamental right is at stake, the state has the burden of justifying its incursion into a sphere of constitutionally protected activity.

Thus, Supreme Court Justices have cited parental rights cases to lend legitimacy to abortion rights, even as they have relegated parental control over education to a second-class right, and perhaps a bare liberty interest. The elevation of abortion to a virtually super-protected right and the simultaneous rejection of claims based on parental control over birth and education apparently represent the specific value preferences of the liberal Justices. The acceptance of this scheme by most academic autonomy theorists represents a parallel series of value determinations.

This preference for unconventional and destructive rights over traditional family and parental rights is illustrated in cases where these two types of rights collide. This occurs in statutes requiring parental consent or notification of a minor's abortion. Parental involvement statutes are a way of facilitating and protecting several traditional parental interests. Such interests include the parents' authority over their minor daughter's decisionmaking, the parental right to raise and instruct offspring within a particular culture and belief system, and the integrity of the family unit. These rights and interests are inherent in the Court's acknowledgment of the primacy of the family over the state in *Meyer v. Nebraska*²⁰⁸ and *Pierce v. Society of Sisters*.²⁰⁹ Yet, when the parental right conflicted with the newly invented abortion autonomy right, Justice Blackmun's majority opinion broadly concluded that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."²¹⁰

Autonomy theory therefore cannot be explained by a pure commitment to autonomy and choice within a certain domain of life. Instead, autonomy theory, and its parallel case law, has demonstrated a marked preference for practices that represent a rejection of traditional or conventional forms of association. The Court has chosen the right to abort — and hence destroy — a fetus, even when asserted by a minor, over the right of adults to make choices regarding the birth, education, and upbringing of their offspring. The Court has been quite solicitous of those who wish to avoid parenthood, but little interested in assisting parents. The Court's disdain for "stereotypical" family life has led it to virtually abandon those Americans who

208. 262 U.S. 390 (1923).

209. 268 U.S. 510 (1925).

210. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

want greater freedom in living and practicing traditional family functions and roles. This disdain for traditional family roles and functions, moreover, has given autonomy theory an antifemale cast, in its implicate disdain for women who engage in traditional reproductive practices. The apparent message is that women who live their lives within the forms of traditional family life are not worthy of the protection of the Constitution.

8. Autonomy Theory, the Supreme Court, and the Protection of Establishment Institutions

The Supreme Court's constitutional preference for the unconventional has been accomplished through a policy of deference to elite institutions. Thus, one common thread linking the judiciary's embrace of abortion rights and rejection of childbirth rights is its acceptance of American Medical Association (AMA) positions. It has been noted that *Roe v. Wade* sounds more like a doctors' rights opinion than a women's rights opinion.²¹¹ For example, Justice Blackmun's summary of *Roe's* holding declared:

[T]he decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.²¹²

Justice Blackmun's prior experience as counsel for the prestigious Mayo Clinic further suggest that an essential goal of *Roe* was the empowerment of the medical profession.²¹³ Justice Blackmun specified in *Roe* that the state could proscribe abortions performed by nonphysicians.²¹⁴ The Court's determination to enforce this limitation was exhibited in *Connecticut v. Menillo*, where the Court upheld a conviction of a nonphysician for performing an abortion under a statute that had been enjoined by a federal district court and held unconstitutional by the state supreme court.²¹⁵

Thus, it appears that the primary purpose of *Roe* was to remove abortion from the jurisdiction of the criminal justice system and the legislative

211. See Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions*, 6 HARV. WOMEN'S L.J. 51, 53-55 (1983).

212. *Roe v. Wade*, 410 U.S. 163, 165-66 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

213. See generally Stephen Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183 (1988) (suggesting that Blackmun could be called the "doctor's friend on the Court").

214. See *Roe*, 410 U.S. at 165 (allowing state to proscribe abortion by persons not licensed as physicians by the state).

215. 423 U.S. 9 (1975).

process and to ensure that it was within the province of the medical profession. This result is highly ironic, given the historical fact, acknowledged in *Roe*, that physicians played a significant role in the nineteenth century campaign to legislatively enact criminal abortion prohibitions, specifically citing their medical knowledge that the fetus is human life.²¹⁶ Justice Blackmun's *Roe* opinion dutifully goes on to record the shift of the American Medical Association in 1967 to standards substantially similar to the Model Penal Code, and then to an even broader acceptance of professional medical autonomy over abortion.²¹⁷ Arguably, the remainder of *Roe* is merely an implementation of the AMA's new position.²¹⁸

The contrast between the judiciary's treatment of abortion and midwifery illustrates that empowerment of the elitist medical profession is a common thread in the modern judiciary's privacy jurisprudence. The *Roe* Court found the abortion choice to be a fundamental right despite a history of strong anti-abortion legislative activity.²¹⁹ By contrast, the history of midwifery is far more supportive of a finding of an implied fundamental right, and yet all of the post-*Roe* appellate opinions reject such a right.²²⁰ Clearly, the failure to protect the rights of women and families to hire midwives maximizes the medical profession's authority over childbirth. Thus, the judiciary appears to consciously or unconsciously manipulate the doctrine of implied fundamental rights in the interests of maximizing the power of the medical profession.

216. See *Roe*, 410 U.S. at 141-42.

217. *Id.* at 142-43.

218. Justice Blackmun's deference to the positions of professional organizations representing the medical professions is not confined to abortion. Thus, in his concurring opinion in *Washington v. Harper*, 494 U.S. 210, 236 (1990), a case concerning the forced treatment of a mentally-ill prisoner with antipsychotic drugs, Justice Blackmun stated:

The difficult and controversial character of this case is illustrated by the simple fact that the American Psychiatric Association and the American Psychological Association, which are respected, knowledgeable, and informed professional organizations, and which are here as *amici curiae*, pull the Court in opposite directions.

Id. (Blackmun, J., concurring).

One gets the impression, reading a passage such as this, that the two organizations could have virtually determined Justice Blackmun's vote if they had been able to agree on a position.

219. See *Roe*, 410 U.S. at 138-41. Justice Blackmun's history of abortion has been viewed by a number of scholars and advocates as significantly distorted and inaccurate. The point herein is that even the history as presented by Justice Blackmun does not easily lend itself to the argument that the Fourteenth Amendment protects the abortion choice as a fundamental right, or the related argument that America has a deeply-rooted history and tradition of permitting women to choose abortion.

220. See *supra* notes 187-96 and accompanying text.

A brief review of the history of childbirth in America underscores this point.²²¹ During the colonial period, and at the time of the enactment of the Bill of Rights in 1791, the vast majority of American births occurred in the home with the assistance of midwives. Birth was generally viewed as a natural process and a frequent social event in the lives of women.²²² Midwifery was universally legal, although some minimal regulation of midwifery existed.²²³ New York City's 1716 midwife ordinance, for example, forbade the midwife from assisting in abortion.²²⁴ By 1750, physicians began the process of competing with traditional midwives. As late as 1791, however, because physicians were comparatively expensive and few in number, and because women commonly objected to the presence of male physicians during birth, most births were still midwife-assisted.²²⁵

During the nineteenth century, physicians intensified their competition with midwives and largely succeeded in displacing them among the upper and middle classes. Nonetheless, even by 1900 midwives attended approximately half of all births in America.²²⁶ The nineteenth century competition between midwives and physicians is best understood in the context of the primitive and varied nature of nineteenth century medicine. The nineteenth century was a time of competition among differing kinds of "physicians," including "regular" doctors, botanic medicine, eclecticism, and homeopathy.²²⁷ "Regular" physicians (the predecessors of today's dominant allopathic physicians) were divided between the elite, who attended the "better" medical schools, "and the great number of poorly educated men who had spent a few months at a proprietary medical school from which they were graduated with no practical or clinical knowledge."²²⁸ Even graduates of elite medical schools often felt completely unequipped to handle their first obstetrical cases.²²⁹ Until the development of bacteriology in the 1870s, regular medicine "had little to offer that was practically superior to empiricism."²³⁰

221. The following historical review is adapted from the Argument section of an amicus brief written by the author of this article. See *Amicus Curiae Brief of the Southern Center for Law and Ethics, Peckmann v. Thompson*, Nos. 90-3334 and 90-3445 (7th Cir.) (filed Aug. 12, 1991).

222. See generally WERTZ & WERTZ, *supra* note 166.

223. See LITOFF, *supra* note 179, at 5.

224. WERTZ & WERTZ, *supra* note 166, at 7.

225. See LITOFF, *supra* note 179, at 7-10; WERTZ & WERTZ, *supra* note 166, at 29-44.

226. See LITOFF, *supra* note 179, at 27, 136.

227. See WERTZ & WERTZ, *supra* note 166, at 49-54.

228. *Id.* at 49.

229. See *id.* at 50.

230. *Id.* at 48.

Indeed, regular physicians used their "popular therapy" of bloodletting on difficult births, sometimes with tragic consequences:

Salmon P. Chase, Abraham Lincoln's Secretary of the Treasury and later Chief Justice, told in his diary how a group of doctors took 50 ounces of blood from his wife to relieve her [post-childbirth] fever. The doctors gave careful attention to the strength and frequency of her pulse, debating and deliberating upon the meaning of the symptoms, until finally Mrs. Chase died.²³¹

Another "popular" therapy applied to women by regular physicians was leeches: "A distended abdomen after delivery might merit the application of twelve leeches; a headache, six on the temple; vaginal pain also merited several."²³²

"Regular" physicians briefly succeeded around 1800 in persuading state legislatures to pass state licensure laws regulating the practice of medicine. However, these early laws proved ineffectual, and "[d]uring the Jacksonian Era even the nonenforced licensing laws were repealed by most states as elitist."²³³ These licensing laws apparently did not apply to midwives, as midwives were not considered physicians. Thus, when the Fourteenth Amendment was enacted in 1868, midwifery was universally legal and almost completely unregulated. There was extensive competition among various kinds of "physicians." Women possessed and exercised extensive choices among a variety of different birth assistants. In addition, nearly all births occurred at home.²³⁴ From the colonial period until the early part of the twentieth century, choices regarding the person(s) assisting childbirth and the place of childbirth were by practice, law, and custom a matter of individual and family choice.

The twentieth century has witnessed the suppression of traditional midwifery. Although Massachusetts was the only state in the early 1900s to outlaw midwifery,²³⁵ other states began to severely regulate midwifery.²³⁶ Nonetheless, during the early twentieth century traditional midwifery generally remained legal and relatively unregulated. One study of American midwives notes that "[t]he 1930 White House Conference Report on Child Health and Protection reported that ten states neither licensed nor con-

231. *Id.* at 68.

232. *Id.* at 68.

233. *Id.* at 49.

234. *Id.* at 133 (Less than 5% of women delivered in hospital in 1900.).

235. See LITOFF, *supra* note 179, at 27, 136.

236. See *id.* at 139-41.

trolled their midwives. Six other states required their midwives to be registered, but not licensed."²³⁷

The American nurse-midwife is a twentieth century creation that "grew out of the midwife debate of the early years of the twentieth century."²³⁸ Nurse-midwifery, which is most often practiced in a hospital or birth center, is a distinct profession standing somewhere between physician-assisted hospital birth and traditional midwifery.²³⁹ The confusing and contrasting modern laws regulating childbirth often empower the medical profession in relation to both traditional and nurse-midwifery, by outlawing the former and overregulating and limiting the practice of the latter.²⁴⁰ In many states today it is difficult for women and families to exercise the kind of choice regarding the place and circumstances of childbirth that have traditionally been available, despite the lack of evidence that physician-assisted childbirth has a better health and safety record than contemporary midwife-assisted birth.

The contemporary continuation of practices of home birth and traditional midwifery, and to a lesser degree of nurse-midwifery, indicates that some women and families are resistant to the medical establishment's domination of birth.²⁴¹ The modern judiciary's rejection of midwifery privacy claims implicitly rejects the view that birth is a natural family event and furthers the medical profession's domination over birth and pregnant women. The judiciary has manipulated the doctrine of privacy rights to place birth, like abortion, within the almost exclusive jurisdiction of medicine. Although privacy rhetorically claims to empower women, it actually appears to increase the medical profession's domination over the pregnant woman's person and body. Once a woman becomes pregnant, her "right to choose" is circumscribed at all points by the medical profession, whether she chooses birth or abortion.

Physicians as a class have had little interest in frustrating the wishes of abortion-seeking women. Indeed, the medical profession in general, and obstetricians and gynecologists specifically, have had little interest of any kind in abortion-seeking women. When a physician is presented with a woman who expresses interest in an abortion the physician generally dismisses the woman with a referral. The majority of obstetricians and gynecologists have simply refused to involve themselves with the practice of abortion,

237. *Id.* at 141.

238. *Id.* at 122, 142-43.

239. *Id.* at 142-45; WERTZ & WERTZ, *supra* note 166, at 284-90.

240. See summaries of laws, *supra* note 181.

241. See WERTZ & WERTZ, *supra* note 166, at 284-94.

despite their theoretically "pro-choice" views. Most abortions instead are performed by abortion specialists at so-called "abortion clinics," where the "counseling" is often done in groups and the woman meets her physician at the time of surgery. It has therefore been most convenient for the medical profession to establish its control over abortion in a way that treats abortion as a second-class, but often lucrative, specialty.²⁴²

Physicians, while promoting "freedom of choice" in regard to abortion, have found it in their interest to encourage legislatures to outlaw and heavily regulate midwifery. Midwife-assisted birth is obviously a threat to the livelihood of obstetricians. Although the number of midwife-assisted births in America is small, there are indications that a much larger number of women would choose a midwife if midwifery were legal and a range of options, from home birth to birth center to midwife-assisted hospital birth, were widely available. The medical profession has effectively used the law to harass and limit the practices of both traditional and nurse-midwifery, thereby eliminating their only competition.

The contours of the privacy right have therefore followed the wishes of the American Medical Association, granting women freedom of choice where it is convenient to the medical profession's interests, and refusing such freedom when it would be threatening to the interests of the medical profession. The contouring of privacy to the desire of a powerful and elite profession is difficult to justify. The medical profession already operates as an extremely powerful and effective lobbying organization at both the federal and state level.²⁴³ Modern theories of the legislative process have emphasized the effectiveness of special interest groups in influencing

242. See *Bellotti v. Baird* (II), 443 U.S. 622, 641 & n.21 (1979) (Powell, J., plurality opinion) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 91-92 & n.2 (1976) (Stewart, J., concurring) (discussing abortion clinic practices regarding pre-abortion "counseling"); Stanley Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63 (1987); Gina Kolata, *Under Pressures and Stigma, More Doctors Shun Abortion*, N.Y. TIMES, Jan. 8, 1990, at A1; Le Anne Schreiber, *Where are the Doctors Who Will Do Abortions?*, GLAMOUR, Sept. 1991, at 280.

The Supreme Court in *Planned Parenthood v. Casey* finally upheld the requirement that a physician actually speak to the woman as a part of the informed consent process. This holding overruled the Court's prior rejection of such a requirement in *Akron I*, 462 U.S. 416, 488 (1983). See 112 S. Ct. at 2824-25. The factory-line mentality of abortionists is illustrated by their complaint, subsequent to *Casey*, that they would not be able to perform as many abortions if they had to spend 20 minutes counseling each patient. See Mimi Hall, *Abortion Doctors Fear 'Greater Stress' for Patients*, USA TODAY, June 30, 1992, at 5A.

243. See generally *152 PACs Raised at Least \$100,000 During First Half of 1991*, PACS & LOBBIES, Oct. 4, 1991 (Of 152 PACs with revenues exceeding \$100,000 for the first six months of 1991, the American Medical Association had the second-highest revenue, at \$1,664,484; in addition, the American Medical Association affiliated with the states of Indiana, Mississippi, New York, Ohio, and Pennsylvania each had revenues over \$100,000).

legislation, even where such legislation is contrary to the best interests of the vast majority of voters.²⁴⁴ The judiciary, it would seem, should act to protect citizens from the medical profession's capacity to shape legislation according to its own interests. Instead, the judiciary has used constitutional law to further the already overwhelming authority of medicine over individuals and families. Ironically, this empowerment of the medical profession has been accomplished through the interpretation of a doctrine that rhetorically claims to protect *individual* choices regarding the family and reproduction.

The same interest group analysis can be applied to the judiciary's failure to protect the right of parents to control the education of their children. The National Education Association (NEA) is among the most powerful lobbying groups in the nation.²⁴⁵ Education is one of the most important state budget items. State education associations, which represent the interests of the state education establishment, represent one of the major interest groups affected by each state's annual budget, and not surprisingly have developed into powerful lobbying organizations.²⁴⁶ Education associations have generally been opposed to home schooling, claiming or implying that the education of the young requires the services of full-time "professional" educators. A rapidly increasing number of home schooling families have made the contrasting argument that education is primarily the responsibility of the family. These home schooling parents have increasingly presented a body of empirical evidence to support their view that home schooling is generally more effective, academically and socially, than public schooling.²⁴⁷ The issue of whether education is a matter of family or professional responsibility parallels the issue of whether birth is a matter of family or medical responsibility.

244. See generally DENNIS C. MUELLER, *PUBLIC CHOICE* (II) (rev. ed. 1989); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

245. See generally *152 PACs Raised at Least \$100,000 During First Half of 1991*, *supra* note 243 (National Education Association's PAC revenues during the first half of 1991 totaled \$986,910, with a balance of over two million dollars; one state association also among PACs over \$100,000.); Carol Innerst, *Two Teachers Unions Speak on Issues*, WASHINGTON TIMES, July 9, 1990, at A7 (discussing convention of the two million member NEA and positions adopted on educational and noneducational issues).

246. See, e.g., THE ALABAMA EDUCATION ASSOCIATION'S LEGISLATIVE CONTACT TEAM HANDBOOK (1992) (discussing organization and methods of association's extensive legislative lobbying).

247. See, e.g., Alfie Kohn, *Home Schooling*, THE ATLANTIC, Apr. 1988, at 20 (current studies uniformly show home-schooled children academically outperforming their traditionally schooled peers; psychological study of self-esteem of home schoolers shows that half performed at or above the 91st percentile and only 10% were below the national average).

The judiciary's treatment of the education profession and "parental choice" has been similar to its treatment of the medical profession and choices concerning childbirth and abortion. In *Roe v. Wade*, the Court announced the principle of choices in childbirth while simultaneously requiring such choices to be made within the constraints of the medical profession. *Meyer v. Nebraska* is the *Roe* of parental rights, in the sense that it was the first substantive due process case to acknowledge and apply such a parental right.²⁴⁸ *Meyer* established the principle that "liberty" includes the right of parents to control the education of their offspring, as part of the broader principle that "our institutions rest" upon the presumption that the child is entrusted to the care of the family, rather than to the care of the state.²⁴⁹ *Meyer*, like *Roe*, can be read as simultaneously limiting the practice of this *individual* freedom by the practices of a profession. The *Meyer* Court stated that "[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto."²⁵⁰ This language could be employed to limit parental rights to the selection of schools and state-certified teachers, just as a pregnant woman's choices regarding childbirth and abortion are limited to selection of a physician who will carry out her wishes.²⁵¹

Despite the numerous cases addressing home schooling and state regulation of private education,²⁵² *Wisconsin v. Yoder* is the only case the Court has chosen to hear in the modern era. In *Yoder*, the Court held that the Amish could home school from ages fourteen to sixteen because "the Amish way of life is successful without" academic schooling beyond age fourteen.²⁵³ The Court's strong hints that only the Amish have such a right emanates from their implicit belief that *academic* education (as opposed to education in farming and homemaking) can only be offered by teachers in schools.

The above analysis suggests that the modern judiciary has been interested in protecting individual and family choices relating to education and reproduction only where such claims are compatible with the interests of

248. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

249. *Id.* at 399-402; see also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (Parents have liberty interest to direct the upbringing and education of their children.).

250. *Meyer*, 262 U.S. at 400.

251. Home schooling advocates would argue that this language, unlike *Roe's* limitation of abortion rights to physicians, is mere nonbinding dicta occasioned by the Court's desire to link the parent's right to the right of teachers to teach and schools to operate. Such an argument would therefore attempt to include home schooling within *Meyer's* protection of parental substantive due process rights.

252. See *supra* notes 202-05 and accompanying text.

253. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

establishment professions. It is unlikely that the judges and Justices who have shaped the doctrine of privacy have deliberately intended that privacy primarily serve the interests of other professions. Probably, the reflexive tendency of those who have reached elite positions within the legal profession has been to defer to those in similar positions within similarly reputable professions. Justices such as Brennan and Blackmun are, despite their ideological liberalism, profoundly establishmentarian. Their focus on *individual* rights obscures their commitment not only to their own authority, as elite members of the judiciary, but also a parallel commitment to the authority of other establishment institutions.

It should also be noted that the professions of law, medicine, and education are ideologically similar. Indeed, the similarities are most marked when one compares the liberal Justices to the elites of the medical and educational professions. The liberal Justices have attempted to further an ideological agenda that takes an amoral, individualistic position on consensual sexuality and abortion, regarding these issues as beyond the competency of government. The liberal Justices at the same time have viewed racial and economic issues in moralistic, communitarian terms, viewing these issues as well within the competency and responsibility of government. The liberal Justices also have tended to take a strict view of the separation of church and state that tends to privatize religion and diminish its public significance. This particular mix of views, which is conventionally labeled as political "liberalism," is mirrored in the political positions urged by representatives and elites of the educational and medical establishments.²⁵⁴ Thus, empowering the medical and educational establishments is in practice an effective means of promoting the liberal political agenda.

I am not suggesting that individual Justices have in some way conspired or planned how best to further a liberal political agenda. Rather, the liberal Justices who have been most active in shaping privacy rights have instinctively rejected or ignored constitutional claimants who attack the hegemony of the establishment institutions with which they are professionally and ideologically comfortable. At the same time, these Justices, and the judiciary in general, have instinctively placed the exercise of individual privacy

254. See, e.g., CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80S, 201-26 (1981) (American leaders are far less likely than the American public to consider behavior such as adultery, homosexuality, and abortion to be immoral; leaders in education, science, and law are usually among the least likely, among nine leadership groups, to consider such behaviors immoral.); Innerst, *supra* note 245, at A7 (while maintaining its abortion rights position, the National Education Association at its annual convention condemned the Professional Golfers' Association for scheduling its championship at a private golf club that denied membership and "guest play" to African-Americans).

rights within the familiar and comfortable context of the elite professions. Indeed, it is probable that the judiciary as a whole, and particularly the liberal Justices, are more comfortable with empowering elite professions than they are in empowering legislatures and political processes. Those committed, as the liberal Justices have been, to a broad value-shaping role for the judiciary implicitly believe in the empowerment of elite professionals in relation to political and majoritarian institutions. The very act of invalidating legislatively-enacted laws based on new and evolving constitutional standards suggests that legal elites are more trustworthy than democratic processes. Thus, the very practice of activist, autonomy-based judicial review suggests an establishmentarian regard for elite professions. In this sense, the tendency of the liberal Justices to empower the medical and educational establishments through their activist privacy interpretations is a consistent act. The Justices, invalidating democratically-created laws regarding, for example, abortion, have implicitly stated that they trust themselves, as elite professionals, more than they trust the capacity of the people for self-government. In rhetorically casting themselves as protectors of women, the liberal Justices have paternalistically suggested that women, who constitute a majority of voters, are incapable of evaluating and defending their own interests within the political process. It is therefore not terribly surprising when these elite professional lawyers paternalistically place pregnant women within the care of another elite profession, by pronouncing pregnant women incapable of aborting or birthing without the assistance of a physician.

9. *Brown v. Board of Education* versus *Roe v. Wade*: The Significance of Moral Discourse for the Strength of Legal Precedent

Defenders of the abortion right have often compared *Brown v. Board of Education*²⁵⁵ to *Roe v. Wade*.²⁵⁶ Justice Blackmun implicitly compared the task of enforcing *Roe* to the Court's prior enforcement of *Brown*.²⁵⁷ Leaders of abortion rights advocacy organizations have compared *Roe* to *Brown* by arguing that judicial nominees who refuse to affirm *Roe* should be just as unconfirmable as those who would refuse to affirm *Brown*. The National Abortion Rights Action League (NARAL) and Planned Parenthood strenuously opposed the confirmation of David Souter to the Supreme Court based on his refusal to affirm that he personally believed abortion to be a

255. 347 U.S. 483 (1954).

256. 410 U.S. 113 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

257. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)).

fundamental right. Kate Michelman, Executive Director of NARAL, explained:

I must say that if there were any question, any question at all, about whether Judge Souter supported the principles upheld in *Brown v. Board of Education*, surely he would not be confirmed without offering clear assurances that he supports the constitutional principle of equality. *Roe v. Wade* was the single most important decision affecting the lives and health of American women. It should be considered as clearly settled as *Brown v. Board of Education*.²⁵⁸

The comparison of *Roe* to *Brown* has rhetorically and legally become an essential part of the abortion rights task of defending *Roe* in the face of increasing opposition. *Roe*, from the beginning, has been viewed even by those sympathetic to its result as a particularly naked exercise of judicial policy-making with little anchor in the Constitution.²⁵⁹ Such a criticism would matter little if the result in *Roe* was itself becoming increasingly accepted with the passage of time. The extreme and apparently unending controversy surrounding *Roe* has, however, suggested that its defense requires a particularly strong justification. *Roe* has, after all, cost the modern Court a great deal of its limited moral and political capital. The Court, like other governmental institutions, must invest its power and legitimacy in a way that ultimately maintains the integrity of the institution.

Abortion has threatened the integrity of the Court in several ways. First, the Justices have been lobbied on the issue as though they were politicians deciding the issue based on a combination of public opinion and personal values.²⁶⁰ Second, the process of nominating and confirming Supreme Court nominees has been significantly distorted by abortion.²⁶¹ Thus, President Bush appeared to deliberately select nominees who either had no track record relevant to abortion or else could plausibly disavow past statements. In the process, the pool of potential Supreme Court nominees was significantly reduced. The confirmation hearings degenerated into a televised game of hide and seek as the Senators asked the nominees, in as many

258. Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, United States Senate, 101st Cong., 2nd Sess. 363 (1990) (statement of Kate Michelman, Executive Director, NARAL).

259. See, e.g., Ely, *supra* note 51, at 935-36, 947.

260. See *Planned Parenthood v. Casey*, 505 U.S. at ___, 112 S. Ct. at 2884-85 (Scalia, J., concurring in judgment in part and dissenting in part); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (1992) (Scalia, J., concurring);

261. See *Casey*, 505 U.S. at ___, ___, 112 S. Ct. at 2882, 2885 (1992) (Scalia, J., concurring in part and dissenting in part) (*Roe* "fanned into life an issue that has inflamed our national politics . . . and has obscured with its smoke the selection of Justices to this Court.").

ways as conceivably possible, to reveal something regarding their views of abortion and *Roe*. If this was not demeaning enough, the second phase of the Clarence Thomas hearings surely brought the confirmation process to a new low. It seems likely that the nominees, whether ultimately successful or not, view the politicized and televised game of confirmation hearings as a humiliating experience.

The only plausible reason for maintaining *Roe*, in the face of unending controversy and its distortive effects, is that it represents a principle of justice as fundamental and basic to American society as racial equality. The claims by abortion rights advocates that *Roe* is as essential to America as *Brown* are no doubt sincere. Many in American society truly believe that abortion rights are necessary to ensure equality. The comparison of *Brown* to *Roe*, however, lacks plausibility for most Americans, and even for most politicians.

Brown's interpretation of racial equality and rejection of separate but equal ultimately rested on a *moral* principle of racial equality. Indeed, this *moral* principle of racial equality has been the basis of intrusive Congressional statutes reaching into the otherwise private spheres of employment and housing. The lack of any continuing significant controversy on the legitimacy of separate but equal is the result of an American moral consensus condemning de jure racial discrimination. *Brown*, in other words, rests on a moral principle that, while initially controversial, has since been accepted, on the whole, by the entire society. Racism, of course, continues, but it has been delegitimized.

Abortion rights advocates, however, have not for the most part attempted to base abortion rights on the argument that abortion is morally correct. They have argued that abortion, whether right or wrong, is a matter for the individual pregnant woman, rather than for the state. *Roe's* refusal to legally determine when human life begins similarly reflects the amoral nature of the abortion rights argument.²⁶² As a strategy, and as rhetoric, the "choice" argument has had many successes. Given the fact that a majority of Americans characterize abortion as "murder," and as morally wrong,²⁶³ it is probably the only way that *Roe's* policy of elective abortion plausibly can be defended. Nevertheless, the fundamentally *amoral* nature of the abortion rights argument is precisely what makes the comparison of *Roe* to *Brown* entirely inapposite. *Brown's* legitimacy is secure because it stands for the moral position that racial discrimination is

262. See *Roe v. Wade*, 410 U.S. 113, 159 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

263. See *supra* note 151-53 and accompanying text.

wrong and equality of treatment is *right*. This principle does not demand governmental *inaction*; rather, it has led to intrusive governmental action in support of the moral principle of *nondiscrimination*. *Roe* never has, and probably never would, stand for any corollary moral principle. It certainly does not, and has not, stood for the proposition that elective abortion is *right*. Indeed, those who *oppose* abortion can claim a kinship to those who oppose discrimination; both stand on a moral principle that they claim is so fundamental as to mandate governmental action.

Those who have opposed *Brown* generally lack any political or legal or moral legitimacy precisely because they oppose a moral principle, nondiscrimination, that is pervasively accepted today. The comparison of segregationists to those opposed to abortion therefore lacks plausibility, even to those most tempted to utter such a comparison. Thus, during the Souter hearings Faye Wattleton was asked by Senator Dennis DeConcini: "Do you think Mr. Duke in Louisiana symbolizes a great movement similar to the right to life movement and those that disagree with your position on abortion, do you think there is a great similarity there?"²⁶⁴

The logical answer, given Wattleton's position that *Roe* was equivalent to *Brown*, and her prior statement that Duke opposed the principles of *Brown*, would have been: "Yes, politicians who oppose abortion rights are just as illegitimate and dangerous as Mr. Duke." Wattleton, however, avoided the question.²⁶⁵ She must have known that to answer "yes" would make her appear both insulting and impossibly radical. Could she really condemn Ronald Reagan, George Bush, John Danforth, Joan Finney, and Bob Casey, along with hundreds of other mainstream anti-abortion politicians, as the moral equivalent of David Duke? Wattleton's dilemma is that unless she can legitimately reduce these politicians to the level of Duke her argument collapses, but the attempt to even make the comparison is implausible and insulting.

Thus, rhetorical attempts to dress anti-abortionist activists such as Joan Andrews, Jayne Bray, Mike McMonagle, and Randall Terry in Klansman's robes, while implicitly comparing Governors Robert Casey and Joan Finney to the segregationist governors of a past era must ultimately fail. Those women and men who sincerely want to "stop childkilling" and "save babies," and who sincerely believe that women are *harmed* by abortion, cannot be morally equated to those who wanted to forcibly maintain racial dominance. Indeed, as the Court considers its options in regard to abortion, it must realize that it cannot foresee any time when morally legitimate

264. Nomination of David H. Souter, *supra* note 258, at 404.

265. *See id.*

opposition to *Roe* would not exist in American society. In *Brown* and subsequent cases, the Court had an understandable moral principle it could, and did, enforce, thereby delegitimizing all opposition. Similarly, Congress's enforcement of the principle of racial equality benefitted from the broad moral appeal of the concept of nondiscrimination. Opposition to *Brown* therefore diminished sharply as the time passed. Today, after two decades, the *Roe* decision is more controversial, and more socially divisive, than it was when announced. The comparison of *Roe* to *Brown* ultimately constitutes one of the best arguments for the Court's abandonment of *Roe*.

Given the above analysis, it is particularly instructive to examine the *Casey* joint opinion's dramatic treatment of the relation of *Roe* to *Brown*. It is worthwhile to quote at length, as the following may prove to be historically significant:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown* II) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown*. . .] cannot be allowed to yield simply because of disagreement with them.")

. . . Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses

to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

. . . Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible.

. . . [*Roe*'s] divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.²⁶⁶

In evaluating this passage, it is important to emphasize that the authors of the joint opinion declined to say whether they believed that *Roe*'s central holding was constitutionally correct. In fact, they hinted that one or more of the authoring Justices would have upheld significant previability abortion prohibitions, so long as the provisions contained certain exceptions, had the issue not already been determined in *Roe*.²⁶⁷ In addition, it is important that the joint opinion acknowledged that "some deem [abortion] nothing

266. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2815-16 (alterations in original).

267. *See id.* at ___, 112 S. Ct. at 2817.

short of an act of violence against innocent human life.”²⁶⁸ The joint opinion specifically referred to the contrasting views that the fetus was “potential life” or “life” without purporting to resolve that dispute.²⁶⁹ Thus, the joint opinion itself variously called the organism carried by the pregnant woman “potential life,” “prenatal life,” “fetal life,” and “the unborn.”²⁷⁰ When specifically referring to the fetus upon viability, the joint opinion used the terminology “second life” and “developing child.”²⁷¹

Chief Justice Rehnquist and Justice Scalia each authored opinions on behalf of the four Justices who would have overruled *Roe* and upheld all of the Pennsylvania statutes.²⁷² Justice Scalia’s opinion constitutes the more important response to the joint opinion’s reliance on *stare decisis* and the legitimacy of the Court. Justice Scalia repeatedly compared the joint opinion, and the majority’s decisions in *Roe* and *Casey*, to Chief Justice Taney’s opinion in *Dred Scott v. Sandford*.²⁷³ Thus, Justice Scalia quoted Justice Curtis’s dissenting opinion in *Dred Scott*²⁷⁴ and Abraham Lincoln’s explanation of the legitimacy of continuing opposition to *Dred Scott*.²⁷⁵ He finally ended by describing a portrait of Chief Justice Taney:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its

268. *Id.* at ___, 112 S. Ct. at 2807.

269. *See id.*

270. *See id.* at ___, 112 S. Ct. at 2811, 2818.

271. *Id.* at ___, 112 S. Ct. at 2817.

272. *See id.* at ___, 112 S. Ct. at 2855-73 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at ___, 112 S. Ct. at 2873-85 (Scalia, J., concurring in part and dissenting in part).

273. *See id.* at ___, ___, 112 S. Ct. at 2876, 2883, 2885 (Scalia, J., concurring in part and dissenting in part).

274. *See id.* at ___, 112 S. Ct. at 2876 (quoting *Dred Scott v. Sandford*, 19 How. 393, 621 (1857) (Curtis, J., dissenting)).

275. *See id.* at ___, 112 S. Ct. at 2883 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) reprinted in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES*, S. Doc. No. 10, 101st Cong., 1st Sess. (1989)).

soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself “call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.”

It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be “speedily and finally settled” by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. . . . Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.²⁷⁶

Justice Scalia’s primary point in comparing the *Casey* joint opinion to *Dred Scott* is to argue that the *Dred Scott* Court was illegitimately attempting to settle a profoundly divisive national issue without an adequate foundation in the actual Constitution, with the ultimate effect of intensifying, rather than settling, the conflict. Thus, Justice Scalia accused the joint opinion of “inventing” a constitution, rather than interpreting one.²⁷⁷ Justice Scalia similarly accused the Court of “almost czarist arrogance,”²⁷⁸ of “Orwellian” rewriting of history,²⁷⁹ of succumbing to the temptations of power,²⁸⁰ and of articulating a “Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be ‘tested by following,’ and whose very ‘belief in themselves’ is mystically bound up in” the Court’s role as spokesperson for their constitutional ideals.²⁸¹ “The Imperial Judiciary lives,”²⁸² concluded Justice Scalia.

The subtext of Justice Scalia’s consistent comparison to *Dred Scott* was to suggest that *Roe*’s constitutional endorsement of elective abortion was as immoral as *Dred Scott*’s constitutional endorsement of slavery. Thus, Jus-

276. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2885 (Scalia, J., concurring in part, dissenting in part).

277. *Id.* at ___, 112 S. Ct. at 2879.

278. *Id.* at ___, 112 S. Ct. at 2884.

279. *Id.* at ___, 112 S. Ct. at 2882.

280. *Id.* at ___, 112 S. Ct. at 2874.

281. *Id.* at ___, 112 S. Ct. at 2882.

282. *Id.* at ___, 112 S. Ct. at 2882.

tice Scalia attacked both the legitimacy of the plurality's unbounded use of "reasoned judgment," and the reasonableness of that judgment:

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society . . . I do not see how that could possibly have produced the answer the Court arrived at in *Roe v. Wade* Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's "important and legitimate interest in protecting the potentiality of human life." But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." . . . The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment.²⁸³ Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.²⁸⁴

Justice Scalia is correct that *Roe*'s claim not to answer the question of when human life begins lacks credibility. This point is underscored by the separate opinions of Justices Stevens and Blackmun. Justice Stevens argued that the unborn must be considered merely "potential" human life so long as they are not considered "persons" under the Constitution. Justice Stevens specifically denied that the states can be said to have an interest in the lives of the unborn absent federal constitutional personhood. The state's interest, therefore, is primarily in combatting disrespect for "potential life."²⁸⁵

Justice Stevens developed this argument in three unusual ways. First, he characterized the states' interests in "protecting potential life" as "an indirect interest supported by both humanitarian and pragmatic concerns." Justice Stevens stated that "many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third trimester abortions performed when the fetus is approaching personhood particularly intolerable."²⁸⁶ Thus, Justice Stevens took his doctri-

283. *Id.* at ___, 112 S. Ct. at 2875 (citations omitted).

284. *Id.* at ___, 112 S. Ct. at 2875.

285. *See id.* at ___, 112 S. Ct. at 2839-40 & nn.2-3 (Stevens, J., concurring in part and dissenting in part).

286. *Id.* at ___, 112 S. Ct. at 2840.

nal denial of the humanity of the fetus to the extreme of distorting the very beliefs of America's millions of pro-life citizens. These pro-life citizens are not concerned with mere "disrespect for potential human life," as Justice Stevens describes it. These pro-life citizens believe that abortion takes an actual, rather than a merely potential, human life. Seven members of the Court were willing to acknowledge this core belief of the pro-life movement.²⁸⁷ Unfortunately, Justice Stevens could not bring himself to describe with integrity the beliefs of pro-life citizens. It is one thing to doctrinally deny the states any interest in protecting the lives of the unborn; it is another to censor and distort the beliefs of millions of Americans in service of a legal fiction.

Second, Justice Stevens stated:

The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.²⁸⁸

Justice Stevens's comparison of the state's interest in "potential life" to the state's interest in potential immigrants seems to support the pro-life perception that *Roe*, like *Dred Scott*, involves the denial of basic human rights to real human beings. The comparison is made more confusing by the fact that aliens have, since 1886, been considered "persons" for federal constitutional purposes, despite the fact that they are not "citizens."²⁸⁹ If Justice Stevens means to say that immigrants must get to America to become constitutional persons, his comparison again underscores the pro-life view that

287. See *id.* at ___, 112 S. Ct. at 2807 (joint opinion) (acknowledging that some deem abortion "nothing short of an act of violence against innocent human life" and that some believe that a "life" is aborted); *id.* at ___, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part) ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life.").

288. *Id.* at ___, 112 S. Ct. at 2840 n.3 (Stevens, J., concurring in part and dissenting in part).

289. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

the unborn are being denied basic human rights merely based on their location within a woman's body.

Third, Justice Stevens implied that he accepts only *Casey*'s reaffirmation of state authority to proscribe some postviability abortions on the basis of stare decisis.²⁹⁰ This comment is apparently made to undergird his general view that the state's interest in the unborn before birth is only an interest in "potential life," and that such an interest generally is too insubstantial to significantly limit a woman's liberty. Justice Stevens, in other words, would probably adopt a simple birth standard had *Roe* not already adopted a viability standard.

Surprisingly, Justice Blackmun approved Justice Stevens's idiosyncratic analysis of the state's interest.²⁹¹ Indeed, Justice Stevens's eccentric Establishment Clause view that the state lacks a "secular" interest in human life before birth²⁹² is apparently approved in *Casey* by Justice Blackmun.²⁹³ The upshot of all this is that the author of *Roe* has specifically adopted the view that under *Roe* the unborn cannot be treated as human and alive. *Roe*'s professed agnosticism on the beginning point of human life is now more or less definitively ended, at least by Justices Blackmun and Stevens. Human life in the legal, secular sense must begin at birth.

The claim that those who are not federal constitutional persons cannot be considered human and alive by the states, even if they, like immigrants, or fetuses, otherwise appear human and alive, is frightening. It implies that the United States Supreme Court is the only possible arbiter of the abortion issue, and that the only possible resolutions are that the Supreme Court impose upon the states either an extreme pro-life or an extreme abortion-rights regime. It also implies that the United States Supreme Court can by legal fictions turn "life" into "potential life," all the while claiming to do so in the name of "liberty" and "humanitarian concerns." Citizens who oppose this kind of doublethink are apparently urged to give up their opposition in the name of something called "the rule of law." It is hard to see, however, how the distortion of reality by wordgames and legal fictions is related to anything as exalted as the "rule of law."

290. See *Casey*, 505 U.S. at ___, 112 S. Ct. at 2838-39 (Stevens, J., concurring in part and dissenting in part).

291. See *id.* at ___, 112 S. Ct. at 2849 (Blackmun, J., concurring in part and dissenting in part) (citing *id.* at ___, 112 S. Ct. at 2840).

292. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 563-72 (1989) (Stevens, J., concurring in part and dissenting in part).

293. See *Casey*, 505 U.S. at ___, 112 S. Ct. at 2849 (Blackmun, J., concurring in part and dissenting in part).

The joint opinion came to the same result by a different route. While conceding that reasonable people can consider the unborn to be human life,²⁹⁴ the joint opinion found that such views, articulated by the states, cannot be the basis for prohibiting abortions. The liberty of the woman, in other words, outweighs the interests of the unborn, even if they are human and alive. The joint opinion refused to actually endorse this balance as a matter of "reasoned judgment"²⁹⁵ or "principled justification,"²⁹⁶ falling back upon the principle of stare decisis.²⁹⁷ In this sense the joint opinion failed, in its own terms, to qualify as a judicial act.²⁹⁸ Despite this specific refusal to affirm the correctness of *Roe*'s balancing, the joint opinion made a broad and startling declaration about the relative weight of life and liberty: "[O]ur cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."²⁹⁹

The primary case relied on to support this statement was *Cruzan v. Missouri Department of Health*.³⁰⁰ This reliance appears inapt. In *Cruzan*, Chief Justice Rehnquist's majority opinion apparently succeeded in limiting the "right to die" to a mere "liberty" interest subject to rational basis analysis, while rejecting a fundamental rights/privacy analysis.³⁰¹ The joint opinion's statement suggests that *Cruzan* may be reinterpreted as requiring clear and convincing evidence that an incompetent adult wishes the with-

294. *Id.* at ___, 112 S. Ct. at 2806-07.

295. *Cf. id.* at ___, 112 S. Ct. at 2806 (Adjudication of substantive due process claims may require the Court to exercise "reasoned judgment.").

296. *Id.* at ___, 112 S. Ct. at 2814 ("A decision without principled justification would be no judicial act at all.").

297. *Id.* at ___, 112 S. Ct. at 2817. The joint opinion stated:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.

Id.

298. The joint opinion acknowledged that "a decision without principled justification would be no judicial act at all." The authors of the joint opinion would probably state that their elaborate explanation of their reliance on stare decisis provides sufficient "principled justification" for their reaffirmation of the viability line. The difficulty with this position is that most commentators on both sides of the abortion debate concede that the *Roe* Court itself failed to provide any "principled justification" of its viability line. Reliance on stare decisis to support the viability standard is, in terms of "principled justification," like building a house of cards in midair.

299. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2810.

300. 497 U.S. 261 (1990).

301. *See Cruzan v. Director, Mo. Dep't. of Health*, 497 U.S. 261, 497 U.S. at 279 n.7 (1990). The *Casey* joint opinion also generally used the language of "liberty" rather than that of "privacy," but at the same time made it clear that undue burdens upon the "right" to choose abortion received exacting scrutiny far beyond that of the "rational basis" test.

drawal of life-sustaining treatment is not an "undue burden" on the right to die. Further, *Cruzan* was originally decided as a case where the liberty and life at stake inhered in one person. The right of one human being to end the life of another would normally be considered a question of a different order. The joint opinion's citation of *Cruzan* to support *Roe*, in the context of a generalized statement about liberty and life, thus seems to imply both that liberty can encompass a right to kill and that such liberty can outweigh the state's interest in protecting innocent human life.³⁰² The import of this analysis is that individuals will eventually possess the "liberty" interest, or fundamental right, to terminate the lives of incompetent family members, including the elderly, the handicapped, and the disabled. Given the demographics of American society and the crisis in health care costs, one can imagine that the generation that legalized abortion and aborted thirty percent of its offspring³⁰³ will eventually be subject to largescale liquidation when the aborted generation determines that the aborting generation have become too expensive or inconvenient. This result, although tragic, would possess a certain measure of justice. As the proverb says, "Train up a child in the way that he should go, and when he is old he will not depart from it."³⁰⁴

The above analysis could be cabined through the joint opinion's statement that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."³⁰⁵ Unfortunately, there is reason to believe that such cabining will be unsuccessful. Justice Scalia was naive when he baldly asserted that *Roe* "is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human."³⁰⁶ Whether through the word games of Justices Blackmun and Stevens, or the joint opinion's eloquence, the net message of *Roe* and *Casey* is that elective abortion must be legal. This same logic, as Justice Scalia may mean to imply, is likely to be applied to the newborn and incompetent

302. The *Casey* joint opinion repeatedly made it clear that it viewed the conflict between the woman's liberty and the state interest in fetal life as the only "difficult question" that faced the Court in *Roe*. See *Casey*, 505 U.S. at ___, ___, 112 S. Ct. at 2810-11, 2817. The joint opinion's comment that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims," clearly is intended, in the context of the opinion, to refer to this conflict between the liberty of the woman and the State's interest in the protection of the life of the fetus.

303. See Torres & Forrest, *supra* note 148, at 169 (Since the late 1970s, approximately 30% of all pregnancies in the United States have ended in abortion, excluding miscarriages.).

304. *Proverbs* 22:6.

305. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2807.

306. *Id.* at ___, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part).

elderly.³⁰⁷ Although Justice Scalia may consider such a view of life and liberty to be clearly wrong, there are many who agree that individual liberty will often outweigh life.³⁰⁸

The debate over whether *Roe* is best compared to *Brown* or *Dred Scott* ultimately is unanswerable absent a moral judgment on abortion, a jurisprudential judgment on the role of the Court, and a pragmatic judgment on the power of the Court. For those who believe that the unborn are not "persons" in a moral and legal sense, that women need the right to abort to be full persons, and that it is the obligation of the Supreme Court to guarantee women this right, the comparison to *Brown* may appear eminently reasonable. For such persons *Roe*, like *Brown* before it, may appear to rest on a moral proposition: the moral necessity of guaranteeing women the full and equal status of full personhood, just as *Brown* guaranteed and applied such full and equal status to African-Americans. From this perspective, three distinctions can still be drawn between *Brown* and *Roe*.

First, the anti-abortion view that the unborn should be given a legal status as persons has more moral legitimacy than did the segregationist view that African-Americans are inferior and should by law be kept separate. This difficulty in morally stigmatizing the opposition to *Roe* is often met by the accusation that pro-lifers really care about subjugating women rather than protecting fetal life.³⁰⁹ This accusation again underscores the legal and moral attempts to brand pro-life activists as Klansmen. The cognitive dissonance created by objections to *Roe* creates a tremendous temptation to distort pro-life motivations and ultimately to libel and crush pro-life opposition.

Second, *Roe* is different from *Brown* because opposition to it has grown more, rather than less, intense with the passage of two decades. The abortion rights response, as reflected in the joint opinion in *Casey*, is to naively hope that such dissent will, if faced with constancy, dissipate. A second response is the legal and political campaign to crush pro-life activism.

Third, the comparison of *Brown* to *Roe* is imperfect because *Brown* is anchored in the text and history of the Constitution, whereas *Roe* appears to be a recent judicial addition to the Constitution. The Fourteenth

307. Justice Scalia commented: "Some societies have considered newborn children not yet human, or the incompetent elderly no longer so." *Id.* at ___, 112 S. Ct. at 2875.

308. See, e.g., David M. Smolin, *Why Abortion Rights Are Not Justified By Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621, 641-46 (1990) (discussing and critiquing views of Laurence Tribe and Judith Jarvis Thomson that justify legal abortion even if fetus is considered a person).

309. See, e.g., TRIBE, *supra* note 28, at 115, 132, 231-38 (1990) (arguing that most people who are anti-abortion are not really motivated by concern for the fetus).

Amendment is textually and historically concerned primarily with the principle of racial equality. The Court has a legitimate, if not exclusive,³¹⁰ role in interpreting and applying the Constitution's commitment to racial equality. It is not easy to see where the Court derives the jurisdiction to settle the conflict between the abortion rights and anti-abortion movements. The abortion rights response has been to read their moral, philosophical, and ideological presuppositions, even their implicit Sartrean existentialism, into the "liberty" protected by the Due Process Clause.

Thus, from an abortion rights perspective the comparison of *Brown* to *Roe* is morally plausible, or even compelling, but pragmatically strained.

The repeated pro-life comparisons of *Roe* to *Dred Scott* are also morally compelling, based on the pro-life presuppositions that the unborn are morally equal to the born and that woman's dignity and equality is furthered, rather than hindered, through legal protection of the unborn.³¹¹ Both *Dred Scott* and *Roe* stretched the Court's authority while subjugating and dehumanizing a powerless group of human beings. Ultimately, women, like slaveowners, dehumanize themselves through the dehumanization of others. Pro-lifers, in other words, view themselves as the abolitionists of the late twentieth century.

Nineteenth-century abolitionists held a variety of views of the Constitution. The most radical group accepted the textual and historical evidence that the Constitution validated and protected slavery, and concluded that the Constitution was "a covenant with death and an agreement with hell."³¹² Others engaged in "redemptive constitutionalism" by interpreting the Constitution as anti-slavery in its deepest principles.³¹³ Those opposing *Roe* have overwhelmingly adopted the second option of redemptive constitutionalism, relying on the lack of any textual or historical evidence indicating that the Constitution protects abortion rights. *Casey's* five to four partial reaffirmation of *Roe* will not in itself change pro-life efforts to "redeem" the Constitution by working for the overruling of *Roe*.

If, however, subsequent Supreme Court appointments and decisions in the next several years make it apparent that *Roe* will substantially survive

310. See, e.g., U.S. CONST. amend XIV, § 5.

311. See, e.g., Robert Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 832 (1986) (The pro-life movement's reading of *Roe v. Wade* as the *Dred Scott* of our day is plausible and significant.); Charles Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973).

312. *Abortion and a Nation at War*, FIRST THINGS, Oct. 1992, at 13 (quoting anti-slavery abolitionist view of the Constitution).

313. See generally Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 35-40 (1983)

for another generation, the pro-life attitude may change. It is not that opposition to *Roe* will cease; it is just that redemptive constitutionalism will be eclipsed by more radical views. Abortion abolitionists will cease to perceive themselves as a part of this nation, in the full sense. This group, comprising perhaps twenty percent of the nation,³¹⁴ can no more accept elective abortion than the abolitionists of the nineteenth century could accept slavery. They can no more accept a nation that is "pro-choice" regarding abortion than the nineteenth century abolitionists could accept the principle that slaveholding was a question of individual choice.

Pro-life leaders recognize, of course, that the return of the abortion issue to the political process would not guarantee the unborn equality before the law. Abortion abolitionists, like the slavery abolitionists, need the hope of progress and the opportunity to work for change, rather than final victory, to keep them connected to the country. *Dred Scott* undermined the hope that slavery could be geographically contained and ultimately extinguished. *Roe* similarly undid the national process of political compromise. If *Roe* comes to look so firmly entrenched as to be a permanent part of our Constitution, then abortion abolitionists will reject that Constitution.

The result for the rule of law of such a rejection would be quite negative. Members of the strongly pro-life minority come primarily from the hard-working, patriotic, law-abiding and stable middle classes of America: the classes that successfully raise children, provide goods and services, and pay the taxes. This class is increasingly being asked to bear the burdens of the failures of government, the abuses of the rich, and the desperation of the underclass. Their willingness and capacity to give is already being stretched close to the breaking point. If the Constitution is permanently made an abortion rights covenant,³¹⁵ the country will, for all practical purposes, lose

314. Opinion polls indicate that the majority of Americans, when asked about specific situations in which abortion should be legal, indicate that the majority of abortions should be prohibited. See *supra* note 154 and accompanying text. However, the percentage of the population that both perceives itself as strongly anti-abortion, and perceives abortion as an important issue, is obviously a much smaller percentage of the population. The variety of results in opinion polling, based on differences in wording and approach, appears to validate the view that the anti-abortion and the abortion rights positions each command the strong adherence of approximately 20% to 30% of the population. These national figures, moreover, mask a good deal of geographical variation. The middle group, nationally representing 40% to 60% of the population, are apparently highly ambivalent about abortion and its legalization. This ambivalence apparently makes it difficult for them to strongly identify with either the anti-abortion or the abortion rights communities. Thus, I have estimated that approximately 20% of the population can fairly be characterized as abortion abolitionists: Those who self-consciously view themselves as "pro-life," and who view the issue as critically important to the meaning of America.

315. Cf. *Planned Parenthood v. Casey*, 505 U.S. ___, ___, 112 S. Ct. 2791, 2833 (1992) (joint opinion) (interpreting the Constitution as a "covenant").

them. You cannot successfully ask a people to build upon what they regard as a compact with death.

By contrast, if *Roe* were overruled in the sense of returning the issue to the political process, both sides would possess a level playing field. Certainly there would be disillusionment among those who believe that our national covenant must include abortion rights. This disillusionment would be lessened by the fact that the abortion rights advocates, for legislative and political purposes, have chosen to treat *Casey* as an overruling of *Roe*. The disillusionment would also be tempered by the opportunity to work through the political process for the cause of abortion rights. Neither side would lack the hope of progress and the opportunity to work for their cause.

10. The Future of Autonomy Theory and Privacy in a Splintered Supreme Court

Autonomy theory, therefore, has three primary roots. First, autonomy theory has read its preeminent valuation of individual autonomy and its corresponding view of the human person into the "liberty" protected by the Due Process Clause. Second, autonomy theory's relatively abstract attachment to choice has been colored by an apparent bias against inherently or traditionally female functions, such as pregnancy and birth. The latter bias is apparently a part of a broader bias against forms of human association found in the traditional family. Third, autonomy theory has been influenced by the activist Justices' high regard for their own authority, as representatives of an elite profession, and also by their correspondingly high regard for the establishmentarian professions of medicine and education.

A truly interpretivist Supreme Court would repudiate, over the course of time, all three roots of autonomy theory, because they have no root in the history, language, structure, or intent of the Constitution. The existentialist vision of individual persons creating themselves and their morality through their choices, and corresponding limitations on governmental authority, are contrary to the predominate understandings of liberty and government during the course of American history from the colonial era through the first half of the twentieth century.³¹⁶ Even today, the definition of liberty as radical autonomy represents the controversial views of certain segments of society, rather than the accepted conventional standard of the nation.³¹⁷ The preference for the unconventional over the conventional, for abortion

316. See generally MICHAEL G. KAMMEN, *SPHERES OF LIBERTY* (1986); JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* (1988).

317. See, e.g., *CONNECTICUT MUTUAL LIFE INSURANCE COMPANY*, *supra* note 254, at 201-26.

over childbirth, for male models of sexuality over traditionally female functions, is similarly discordant with, and contrary to, predominant understandings and values throughout the course of American history. Finally, the elevation of the elite professions of law, medicine, and education above that of individual and family choice, and above that of the democratic process, can hardly be considered to be firmly rooted and accepted in American history and tradition, despite its prevalence at various times. The popular movements of resistance to Supreme Court rulings, to the educational establishment, and to medicine's stranglehold on birth, represent reassertions of traditional American views regarding the pre-eminence of the family, the individual, and the legislature.

The acceptance of the abortion right by Justices Kennedy, O'Connor, and Souter, even as a matter of stare decisis, suggests that these Justices are moving toward the noninterpretivist notion of an evolving constitution embodying modern existentialist notions of autonomy and freedom. These Justices, however, will not easily relinquish their claims as interpretivist Justices. The joint opinion in *Casey* evidences a desire to portray its authors as moderate interpretivists in the tradition of the second Justice Harlan.³¹⁸ The joint opinion offered itself as the middle way between the evolving constitutionalism of Justice Brennan and Justice Black's complete rejection of substantive due process.

The *Casey* joint opinion methodology, however, is indistinguishable from the methodology of Justices Brennan and Blackmun. Both the joint opinion and the liberal Justices infuse existentialist notions of "liberty" into the nineteenth century text of the Fourteenth Amendment. Both freely disregard deeply rooted American traditions, including traditions embodied by the specific and universal prohibition of a claimed "liberty." Both feel comfortable in constitutionalizing a highly individualistic concept of marriage and family, despite its dissonance with common law and other legal and cultural traditions. Both feel comfortable with the Court as the arbiter and balancer of conflicts between liberty and life. Both, in essence, are quite comfortable with the Justices imposing their personal views of very personal subjects, including marriage, the family, abortion, liberty, and life, upon the people of this nation.³¹⁹

318. Thus, the joint opinion repeatedly quotes Justice Harlan with approval. See *Planned Parenthood v. Casey*, 505 U.S. ___, ___, 112 S. Ct. 2791, 2805 (1992) (quoting *Poe v. Ullman*, 367 U.S. at 543 (Harlan, J. dissenting)); *id.* at ___, 112 S. Ct. at 2806 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

319. The joint opinion stated that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Casey*, 505 U.S. at ___, 112 S. Ct. at 2806. Of course this is true, in the sense that the Constitution does not permit judges to enact legislation based upon their personal

The joint opinion's disdain for history as constraining text is illustrated by its astonishing claim that absent *Roe*, the Constitution would permit forced abortion.³²⁰ In contrast, Justice Harlan's dissent in *Poe v. Ullman* clearly stated that substantive due process analysis must "be built upon" the people's legal, moral, and cultural traditions; thus, Justice Harlan constitutionally protected marital intimacy while maintaining the constitutional validity of laws proscribing adultery, fornication, and homosexual sodomy.³²¹ Justice Harlan's methodology would permit a constitutional distinction between forced abortion and abortion prohibitions based on the different legal, moral, and cultural histories of voluntary childbirth and elective abortion. Even today, can anyone doubt that the act of voluntarily giving birth, and the act of electing an abortion, evoke very different moral responses from the vast majority of Americans? The substantive due process legacy of cases such as *Meyer v. Nebraska*,³²² *Skinner v. Oklahoma*,³²³ and *Griswold v. Connecticut*³²⁴ provides ample means for prohibiting the state from interfering with the liberty to give birth, without any necessary resort to *Roe*, under Justice Harlan's methodology.

By contrast, the joint opinion's inability to perceive even the *possibility* of a constitutional distinction between forced abortion and prohibited abortion bespeaks adoption, at a profound level of analysis, of an autonomy view of liberty, under which historical, legal, and moral distinctions between various actions are swept away by the demand for "choice." Under this methodology, once a "subject" is included as a constitutional right, all choices regarding it must be protected equally. Thus, if one protects the act of giving birth, one must protect the act of aborting. The liberal Justices have espoused this sort of constitutional amorality,³²⁵ while in practice

moral views. The question before the Court, however, was whether *the people* could impose certain moralities upon themselves, not whether the Court could impose a moral code upon the people. The historic position of this nation has been that states possess the police power by which the state legislatures *can* prohibit certain conduct based upon the morality of the people. The substantive due process methodology employed and endorsed by the joint opinion permitted the Justices to use their own "reasoned judgment" to set aside these legislative reflections of the people's morality. This "reasoned judgment," moreover, was not limited by the history and traditions of the American people. This acceptance of the Justice's use of "reasoned judgment" to overrule the history and traditions of the people, and the democratically-created acts of the states, represents nothing short of the imposition of the Justice's views upon the nation.

320. See *Casey*, 505 U.S. at ___, 112 S. Ct. at 2811.

321. See *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

322. 262 U.S. 390 (1923).

323. 316 U.S. 535 (1942).

324. 381 U.S. 479 (1965).

325. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting).

favoring the unconventional over the conventional.³²⁶ Justice Harlan, however, rejected both neutrality regarding "subjects" and favoritism for the "unconventional" in favor of respect for the moral and legal traditions of the American people. The joint opinion's consistent rejection of these kinds of moral and legal traditions indicates that their claim to the mantle of Justice Harlan is profoundly flawed.

It is true that the personal and political views of Justices Kennedy, O'Connor, and Souter are more "moderate" or less "liberal" than those of Justices Brennan, Blackmun, and Marshall. This is extremely important given the methodological willingness to read personal and political views into the Constitution. The authors of the joint opinion could express this "moderation" by limiting *Casey*'s precedential weight to the subject of abortion. The joint opinion's reliance on the precedential weight of *Roe*, coupled with their statement that the abortion choice implicates liberty in a "unique" way,³²⁷ could be used to distinguish *Casey* from issues such as consensual adult sexuality or physician-assisted suicide. In this manner, the apparent inconsistency between the respective results and methodologies of *Roe* and *Hardwick* could continue indefinitely. It may simply be that gay men do not command the sympathy of these three individual Justices to the same degree as abortion-seeking women.

However, it seems more likely that the joint opinion's acceptance of an autonomy vision of "liberty," coupled with its generalized preference for "liberty" over "life," will reverberate throughout the law. The difficult legal and moral issues present at the end of life are likely to be profoundly influenced by the assumptions and methodologies of the *Casey* joint opinion. The joint opinion's vision of the role of the Court in itself has implications for the entire range of constitutional issues. Thus, the joint opinion's premise that "any error in *Roe* is unlikely to have serious ramifications in future cases"³²⁸ appears seriously misguided. If you accept the joint opinion's contention that *Roe* is the most controversial and significant precedent since *Brown*,³²⁹ it surely makes a profound difference whether or not it was correctly decided. The Supreme Court cannot err in the most important case in the last twenty years, and expect that nothing will come of it. Thus, if there is error in *Roe*, and in *Casey*'s partial reaffirmation of *Roe*, that error will have profound implications for the future of the Court.

326. See *supra* notes 164-210 and accompanying text.

327. *Planned Parenthood v. Casey*, 505 U.S. ___, ___, 112 S. Ct. 2791, 2807 (1992).

328. *Id.* at ___, 112 S. Ct. at 2811.

329. See *id.* at ___, 112 S. Ct. at 2815.

It is still possible to hope that *Casey* will someday be replaced by a true form of moderate interpretivism, a true middle way between the evolving constitutionalism of Justice Brennan and Justice Black's rejection of substantive due process. Toward that end, the following section critiques no-privacy theory, as a prelude to a sympathetic portrayal of that moderate interpretivism.

C. Interpretivism and the No-Privacy Theory

1. Principles and Presuppositions of the No-Privacy Theory

Eminent Justices and scholars have argued against the legitimacy of substantive due process and its modern version, the right of privacy. Justice Holmes rejected substantive due process in its application to both economics and parental rights.³³⁰ Justice Black argued that *Lochner v. New York*, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Griswold v. Connecticut* were equally flawed and illegitimate.³³¹ More recently, John Hart Ely and Judge Bork have championed the view that the Due Process Clause is purely procedural and has no substantive component.³³²

These rejections of substantive due process share several themes. First, all argue that the reading of unenumerated substantive rights into the Constitution is undemocratic; it allows Justices to invalidate laws based on the Justices' personal moral or political views. Judicial review is viewed as legitimate, and consistent with democracy, only if the Justices are truly interpreting a prior agreement of the political community, embodied in the Constitution, not to enforce certain kinds of laws. It is hard enough, it is argued, to objectively interpret the phrases of the Constitution explicitly granting rights; allowing judges to invent new rights will make it impossible to maintain even the pretense that the Constitution is not being altered to suit the personal desires of the Justices.³³³

Second, this "democracy" theme is almost invariably accompanied by a "positivism" theme. When Justice Black discussed substantive due process, he repeatedly labeled it, with some apparent derision, "natural law" due process.³³⁴ Justice Holmes's articulation of a positivist philosophy of law is a basic part of the intellectual history of American law. John Hart Ely's

330. See *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting); see also *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

331. See *Griswold v. Connecticut*, 381 U.S. 479, 515-16 (1965) (Black, J., dissenting).

332. See ROBERT BORK, *THE TEMPTING OF AMERICA* 31-32 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-21 (1980).

333. See, e.g., ELY, *supra* note 332 at 1-104. See generally *Griswold*, 381 U.S. at 507-27 (Black, J., dissenting).

334. See *Griswold*, 381 U.S. at 511 n.3, 515-17 n.10, 524 (1965) (Black, J., dissenting).

Democracy and Distrust took a mere seven pages to dismiss the view that natural law could serve as a basis for identifying fundamental rights.³³⁵ Ely's disdain for natural law led him to compare it to a ghost: an outmoded concept that our society "no longer believes in."³³⁶ Judge Bork's rejection of natural law argumentation in law is similarly clear.³³⁷

The third theme concerns the competency of judges. Judges, it is said, are not endowed with any superior ability or training in moral philosophy or public policy analysis. Even if one wanted government by philosopher-kings, a panel of lawyers would make an extremely poor choice. Judges similarly lack any special competency, particularly as compared to legislators, in evaluating the changing values and views of the people. Therefore, even though government must change with the people, judicial invalidation of legislative choices is an illogical way to ensure that laws reflect popular sentiment. Lawyers and judges are good at interpreting words and principles and applying them to real-life conflicts; they are good at issues of process, the means by which disputes regarding values, goods, and services are mediated and settled.³³⁸

These themes lead to the conclusion that the Constitution is merely one kind of positive law. "Constitutional" interpretation becomes the application of the principles contained in the text of the Constitution to particular controversies; it excludes by definition the discovery of principles not explicitly enumerated in the text. No-privacy theorists recognize that the Constitution contains some principles more general than the average statute—in the famous words of Chief Justice Marshall, "It is *a constitution* we are expounding."³³⁹ They similarly acknowledge that there is a certain degree of indeterminacy in the process of applying broad principles to specific controversies. The art of judging is viewed as the discipline of discovering the principles intended by the lawmakers and applying *those* principles to specific facts. Originalists generally are willing to contradict the views of the lawmakers as to the implications of a principle for specific controversies: for example, the implications of racial equality to the field of public education. The essence of no-privacy originalism is therefore the refusal to

335. ELY, *supra* note 332, at 48-54.

336. *Id.* at 39.

337. BORK, *supra* note 332, at 66-67, 209-10.

338. See, e.g., ELY, *supra* note 332, at 102; McConnell, *supra* note 98, at 1534-37 (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)).

339. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415 (1819) (emphasis added).

discover unenumerated principles, and especially unenumerated fundamental rights, in the Constitution.³⁴⁰

The writings of no-privacy advocates reveal that their primary value is often a certain theory of American democracy. Indeed, no-privacy theorists sometimes value their vision of constitutional democracy above the actual written constitution.³⁴¹ Ely, for example, admits that several constitutional provisions, particularly the Privileges and Immunities Clause, the Equal Protection Clause, and the Ninth Amendment, are so open-ended as to invite future generations, and judges, to give them content.³⁴² Ely makes it clear that, where necessary, democracy trumps the written constitution: "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them."³⁴³

To be fair, Ely believes that interpreting open-ended provisions in a "representation-reinforcement" manner can be termed the "ultimate interpretivism,"³⁴⁴ because it applies the design of the Constitution as a whole to the open-ended provisions. However, even Ely admits that his argument from "the general contours of the Constitution is necessarily a qualified one," and that his theory's consistency with democratic theory is "if anything more important. . . ."³⁴⁵ Ely suggests, moreover, that in rejecting unenumerated rights Justice Black "rejected the counsel of text and historical purpose and turned to his own vision of what is right, [and] began to engage in his own brand of noninterpretivism."³⁴⁶ Ely thereby acknowledges what seems obvious: Justice Black's ultimate touchstone, despite his protestations, was a certain vision of democracy, rather than the written Constitution itself.

No-privacy theorists generally share a number of factual premises. First, no-privacy theorists presume that the rejection of unenumerated rights will actually restrain the judiciary. On the surface, this claim seems plausible; presumably one can run farther afield with the right to invent

340. See, e.g., BORK, *supra* note 332, at 74-83, 143-60; McConnell, *supra* note 98, at 1524-25, 1535-36.

341. But see McConnell, *supra* note 98, at 1525 (Greatest appeal of originalism is not compatibility with democracy but rather that the Constitution "is an elegant and profound statement of a highly attractive conception of government.").

342. See ELY, *supra* note 332, at 22-41.

343. *Id.* at 41.

344. *Id.* at 88.

345. *Id.* at 101.

346. *Id.* at 28, 31.

new principles than one can if restricted to interpreting a limited number of preexisting principles. Nonetheless, as respected a jurist as the second Justice Harlan rejected this factual premise. Thus, Justice Harlan's *Griswold* concurrence stated:

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times". . . . Need one go further than to recall last Term's reapportionment cases . . . where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? . . . Judicial self-restraint . . . will be achieved . . . only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.³⁴⁷

A second factual premise held by antiprivacy proponents is that the protection of unenumerated substantive rights cannot serve, in Ely's terminology, as a representation-reinforcing measure, or more broadly, as an *aid* to representative government. Ely, of course, knows that the right of free speech, a substantive right, is an invaluable aid to representative government. He seems to presume, unfortunately, that substantive due process rights could never perform a similar role. This is a rather odd oversight for Ely, whose entire theory purports to be an elaboration of footnote four of *Carolene Products*. In *Democracy and Distrust*, Ely quotes the footnote, but leaves out its citations.³⁴⁸ He thereby avoids explaining the paradox that the third paragraph of the note, which concerns protection of minorities, cites as examples *Pierce*, *Meyer*, *Bartels*, and *Farrington*, the four substantive due process cases of the 1920s concerning parental rights and education. Justice Holmes, as noted above, had dissented from this line of cases, apparently considering their use of substantive due process analysis in the field of parental rights just as nefarious as in the area of economics. Justice

347. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (citations omitted).

348. ELY, *supra* note 332, at 75-76.

Black and Bork echoed Holmes's opinion,³⁴⁹ although Bork has suggested that the "results" in *Pierce* and *Meyer* might be reached today through the incorporation of the First Amendment.³⁵⁰ There is little doubt that the laws involved implicated, in some sense, First Amendment values, and also that anti-foreign sentiment and nativism motivated them. This admission, however, does not mean that those litigants, or future litigants, would be adequately protected under the First Amendment or the Equal Protection Clause. It is, *a priori*, entirely possible that protecting a substantive parental right would be an invaluable means for protecting the marketplace of ideas, and the status of minorities, from certain kinds of attacks, and thereby would represent an invaluable guardian of the representative process.

2. The Future of No-Privacy Theory

Jurists and theorists who support the elimination of substantive due process argue that any doctrine that produced *Dred Scott v. Sandford*,³⁵¹ *Lochner v. New York*,³⁵² and *Roe v. Wade*³⁵³ is a profound threat to the country and to the Court.³⁵⁴ Justice Harlan's confidence in the capacity of the Court to exercise restraint in its application of substantive due process can sound hollow when viewed in concrete historical perspective. The errors that the Court has made in the name of substantive due process are so significant, and have produced such a degree of national trauma, that the good which has been done in the name of the doctrine tends to be overshadowed.

Justice Harlan had promised that a substantive due process holding which "radically departs" from the "living tradition" of the country "could not long survive." It did not require a large number of years for *Dred Scott* to be effectively overruled, but it certainly required a large number of lives. *Lochner v. New York* and its progeny required more than a generation to overrule, producing an immeasurable impact upon the workers and families who lived under a national regime of social Darwinism.

349. See *supra* note 331.

350. BORK, *supra* note 332, at 48-49.

351. 60 U.S. (19 How.) 393 (1857).

352. 198 U.S. 45 (1905).

353. 410 U.S. 113 (1973), *aff'd in part, overruled in part*, *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

354. Cf. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2883 (Scalia, J., concurring in part and dissenting in part) (citation omitted) (*Dred Scott* was possibly the Supreme Court's first substantive due process holding and is the original precedent for *Lochner* and *Roe*.).

The joint opinion in *Casey* quoted Justice Harlan's promise about the timely correction of error,³⁵⁵ but added a new twist: Error, it turns out, cannot be corrected even where it exists, so long as the country remains intensely divided.³⁵⁶ The more significant the holding and the more intensely divided the nation, the less willing the Court is to review and correct its past errors.³⁵⁷ Justice Harlan apparently forgot to tell us that in correcting errors, the right time is when it doesn't matter anymore. The joint opinion made the arguments against the doctrine of substantive due process particularly attractive by magnifying the risks of judicial overreaching and error. Taking *Casey* as a precedent about precedent, we are left with a Court that not only claims the right to recognize new implied rights, but also claims that its willingness to reexamine such holdings is inversely proportional to the importance and divisiveness of its holdings. Looking ahead to a future of biomedical life and death issues, and continuing conflicts over nontraditional forms of sexual and reproductive activity, one trembles, awaiting the day when the Court again plunges itself into the thicket of national controversy.

In addition, the joint opinion paradoxically rendered the original understandings of the Constitution far less mutable than the Court's later modifications of those understandings. The Court, according to the joint opinion, adjudicates substantive due process claims through the methodology of "reasoned judgment,"³⁵⁸ unbounded by the legal and cultural history and traditions of the American people.³⁵⁹ The Court, in other words, has the authority to change the meaning of the Constitution. Yet, when the Court so acts to change the meaning of the Constitution, and meets resistance, the new meaning, unlike the original understanding, is virtually immutable. This inversion of the proper relationship between the Court and the Constitution, and the Court and the people, is a particularly compelling argument for the abandonment of substantive due process.

Roe has been the best argument of this generation's opponents of substantive due process, just as *Lochner* helped undergird the arguments of a prior generation. Without *Roe*, the relatively technical arguments against the doctrine of substantive due process would have remained passionless and ineffective. Without *Roe*, the benefits of a doctrine that produced

355. See *id.* at ___, 112 S. Ct. at 2806 (quoting *Poe v. Ullman*, 367 U.S. 487, 542 (1961) (Harlan, J., dissenting)).

356. See, e.g., *id.* at ___, 112 S. Ct. at 2815-16.

357. See *id.* at ___, 112 S. Ct. at 2812-16.

358. *Id.* at ___, 112 S. Ct. 2806.

359. See *id.* at ___, 112 S. Ct. at 2805. It is noteworthy that the joint opinion dropped any attempt to justify *Roe* in historical terms.

Meyer v. Nebraska,³⁶⁰ *Pierce v. Society of Sisters*,³⁶¹ *Skinner v. Oklahoma*,³⁶² *Griswold v. Connecticut*,³⁶³ and *Loving v. Virginia*³⁶⁴ would loom much larger than the traumas and misfortunes of bygone generations. *Casey*, in both its partial reaffirmation of *Roe* and its expansive doctrine of stare decisis, further strengthens the case against substantive due process.

Of course, in one sense, if even in a highly distorted sense, substantive due process will last as long as *Roe* stands. Nonetheless, it is the attaching of substantive due process to *Roe* and the consequent obscuring of the true path of moderate interpretivism that constitutes the greatest long-term threat to the viability of the doctrine. So long as *Roe* lives, the arguments against substantive due process will live. Only when and if *Roe* is overruled and the Court demonstrates that it can responsibly apply the doctrine will the arguments against substantive due process abate.

D. Family Sphere Theory and Privacy

1. The Historical Development of Family Privacy

The legitimate roots of privacy are found in implicit understandings about the relationship of families and government. In 1923, in *Meyer v. Nebraska*, the Court had the occasion to recognize the primacy of the family as an explicit part of our constitutional scheme. The Court's discussion compared certain ancient approaches to the relationship of family to state, to the approach implicit in the United States Constitution:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from

360. 262 U.S. 390 (1923).

361. 268 U.S. 510 (1925).

362. 316 U.S. 535 (1942).

363. 381 U.S. 479 (1965).

364. 338 U.S. 1 (1967).

those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.³⁶⁵

The *Meyer* court embraced the view that the Constitution contains certain implicit understandings about the relationship of family and government, despite the absence of direct textual references to the family. The Court chose to locate the textual protections of these implicit understandings in its interpretation of the "liberty" protected by the Due Process Clause:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³⁶⁶

Meyer thereby represents an acceptance of unwritten and unenumerated understandings and rights into the written Constitution, and an identity or association of these understandings and rights with common law privileges. This methodology led the Court to acknowledge, as a constitutional principle, the primacy of the family in relation to the state, in the sense that the state normally could not intrude within the sphere of the family.

The immediate progeny of *Meyer* include its companion case, *Bartels v. Iowa*,³⁶⁷ and two subsequent cases: *Pierce v. Society of Sisters*³⁶⁸ and *Farington v. Tokushige*.³⁶⁹ In all four cases, the Court invalidated state restrictions on the education of minor children, based, in part, on the parents' right to control and direct the education of their children. The Court thus decided four parental rights cases concerning state regulation of education in the short period from 1923 to 1927. The Court's protection of the sphere of the family during this period was apparently vigorous.

The legitimacy of *Meyer* and its progeny was called into question by the Court's subsequent abandonment of economic substantive due process analysis. The Court first signaled the end of economic substantive due process in 1937 in *West Coast Hotel v. Parrish*,³⁷⁰ overruling *Adkins v. Children's*

365. *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (omission in original).

366. *Id.* at 399 (citations omitted).

367. 262 U.S. 404 (1923).

368. 268 U.S. 510 (1925).

369. 273 U.S. 284 (1927).

370. 300 U.S. 379 (1937).

Hospital,³⁷¹ an economic substantive due process case decided in 1923, the same year as *Meyer*. In 1938, the Court in the famous footnote four of the *Carolene Products* case began to suggest new bases and guidelines for heightened judicial review. The Court, after noting that governmental intrusion of textual rights might merit heightened scrutiny, stated:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, or national, *Meyer v. Nebraska*; *Bartels v. Iowa*; *Farrington v. Tokushige*, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.³⁷²

The Court therefore proposed, within a year of its undermining of economic substantive due process, alternative bases for maintaining the holdings of *Meyer* and its progeny. The Court's implicit suggestion that the laws invalidated in *Meyer* and its progeny arose from religious and national prejudice is apparently accurate. The state statutes invalidated in *Meyer* and *Bartels* had prohibited the teaching of modern foreign languages prior to the ninth grade.³⁷³ The *Meyer* Court itself evidenced a keen awareness of the nativism motivating the statutes. The Court noted that "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries" motivated the statutes.³⁷⁴ The Court's response to this nativism was to imply sympathy with the goal of Americanization while rejecting the means employed.³⁷⁵ Thus, the Court ultimately and meaningfully declared that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."³⁷⁶

Oregon, prior to *Meyer*, had by popular vote adopted a different strategy: Rather than attempting to control what was taught in private schools, the state simply required attendance at public school. A Roman Catholic

371. 261 U.S. 525 (1923).

372. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (citations omitted).

373. *See Meyer v. Nebraska*, 262 U.S. 390, 397 (1923); *see also Bartels v. Iowa*, 262 U.S. 404, 409-10 (1923).

374. *Meyer*, 262 U.S. at 402.

375. *Id.*

376. *Id.* at 401.

religious order and a private nonreligious military academy sued, producing *Pierce v. Society of Sisters*.³⁷⁷ Oregon's legal arguments before the Supreme Court suggest that nativism had motivated the voters:

The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens.³⁷⁸

Oregon believed this matter of Americanizing immigrants to be so urgent that it further argued that the law "may also be sustained under the powers of the State in connection with its duties to aid the United States in time of war."³⁷⁹ The State warned that compulsory public education was necessary to prevent, at some hypothetical future point, "the entire education of a considerable portion of its future citizens [from] being controlled and conducted by bolshevists, syndicalists and communists."³⁸⁰ Oregon attempted to distinguish *Meyer v. Nebraska* by claiming that the State had the authority to require immigrants to send their children to public school, where they would be taught "the English language, and the character of American institutions and government."³⁸¹

Interestingly, Oregon also relied on a version of the Americanization, or homogenization argument, quite similar to contemporary arguments against home schooling and school choice:

The voters in Oregon might also have based their action . . . upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers.³⁸²

377. *Pierce v. Society of Sisters*, 268 U.S. 510, 530-33 (1925).

378. *Id.* at 526.

379. *Id.* at 527.

380. *Id.* at 526.

381. *Id.* at 525.

382. *Id.*

Footnote four of *Carolene Products* placed *Pierce* in the category of cases reviewing statutes aimed at religious minorities. This characterization is probably accurate, in the sense that most of the private schools in the state were Roman Catholic. However, this characterization misses the broader context: The attack on private religious education was as much motivated by nativism as the earlier prohibition of teaching foreign languages. States were attempting to use their control over education to Americanize immigrants; religious education, like foreign language training, was restricted as a means of homogenizing Americans.

The *Carolene Products* Court's claim that the statute invalidated in *Farrington* was aimed at national minorities is easily documented. The territory of Hawaii enacted sweeping regulations of foreign language schools. The great majority of these schools were conducted in Japanese; the remainder were Korean or Chinese. The education provided in these schools was supplemental to that received in public or other private schooling.³⁸³

The Supreme Court in *Farrington* concluded that the regulations give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books. . . . The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.³⁸⁴

Hawaii's legal argument before the Court probably contributed to the Court's conclusion that the statute was an attack upon national minorities:

It would be a sad commentary on our system of government to hold that the Territory must stand by, impotent, and watch its foreign-born guests conduct a vast system of schools of American pupils, teaching them loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of the home language in the public schools. . . .³⁸⁵

The Court's view in *Carolene Products* that the parental rights cases of the 1920s protected the rights of national and religious minorities was nothing new; the original opinions themselves had evidenced awareness of the Court's obligation to protect these minority groups. Some, however, might read *Carolene Products* to imply that an equal protection analysis could adequately substitute for the original substantive due process of *Meyer* and its progeny. I would, however, suggest quite the opposite: The Court was

383. *Farrington v. Tokushige*, 273 U.S. 284, 290-91 (1927).

384. *Id.* at 298.

385. *Id.* at 285-86.

suggesting its understanding that substantive protection of parental rights could *perform an equal protection function*. *Carolene Products* was arguably groping toward an essential insight: Protection of certain substantive unenumerated rights serves to facilitate both the political process and the protection of minorities.

The alternative view, that one should eliminate substantive parental rights and reduce the *Meyer* line of cases to equal protection cases, would hinder, rather than serve, the protection of "discrete and insular minorities." Invidiously discriminatory intent is easy to find in *Meyer*, *Pierce*, and *Farrington* because it is present in the government's very arguments. Proof of such animus in any contemporary case, however, would be nearly impossible given the Court's holding in *Washington v. Davis* that discriminatory effect is insufficient.³⁸⁶ Even in the 1920s, the State of Oregon was sophisticated enough to argue that mandated public schools served the interests of racial and religious integration. States in the 1990s and beyond could give an endless number of legitimate reasons for mandating *public* education, if equal protection was the only basis for constitutional review.

It has unfortunately been commonplace since *Carolene Products* for academics to attempt to rewrite *Meyer* and its progeny as principally concerning some constitutional right other than the parental right to control education. It has been suggested that these cases are principally free exercise of religion cases, despite the fact that *Pierce*'s companion case involved a nonreligious military academy and the national, rather than religious, discrimination in *Meyer*, *Bartels*, and *Farrington*. Many contemporary parents and schools similarly cannot claim a direct religious basis for their desire to control their children's education. Parallel claims that *Meyer* and its progeny are somehow free speech cases have remained vague, suggesting that their proponents are more interested in eliminating parental rights than discovering how to protect them in contemporary conflicts. Certainly, it is difficult to conceptualize how free speech would safeguard the right of parents to home school their children or resolve conflicts over the degree of appropriate state regulation of home and private schools.

However *Carolene Products* is interpreted, it seems to evidence a desire to maintain the validity of *Meyer* and its progeny, despite the abandonment of economic substantive due process. In time, it became clear that the most direct way of maintaining *Meyer* while repudiating *Lochner* was to make a dichotomy in subject matter. Justice Frankfurter's discussion of the "preferred position" of free speech is important to this process of distinguishing *Lochner*:

386. See *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.³⁸⁷

Justice Holmes, however, had both dissented from *Meyer* and upheld forced sterilization in *Buck v. Bell*,³⁸⁸ stating in *Buck*: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough."³⁸⁹ Holmes's acceptance of free speech as a preferred right, distinguishable from economic rights, clearly did not lead him to see the same value in family relations or reproductive rights.

By the time that Justice Frankfurter compared free speech to economics in 1949, the Court had already had occasion to question Holmes's acceptance of forced sterilization. Thus, the Court in *Skinner v. Oklahoma*³⁹⁰ in 1942 had invalidated Oklahoma's sterilization of "habitual criminals," continuing the tradition begun in *Meyer* and continued in *Carolene Products* of linking the protection of the family with the protection of minorities. Justice Douglas began his opinion by stating openly that "[t]his case touches a sensitive and important area of human rights."³⁹¹ Later in the opinion he explained how this right was linked to the protection of minorities:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.³⁹²

387. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

388. 274 U.S. 200, 207 (1927).

389. *Id.* at 207 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

390. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

391. *Id.* at 541.

392. *Id.*

Justice White, in his concurring opinion in *Griswold v. Connecticut*, combined the language and methodology of Frankfurter and Holmes with the insight, generally adhered to by the Court despite Holmes, that family relations are special:

[T]his is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer* . . . , and "the liberty . . . to direct the upbringing and education of children," *Pierce* . . . , and that these are among "the basic civil rights of man." *Skinner*. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince*. Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* . . . (opinion of Frankfurter, J.).³⁹³

Justice White thereby reaffirmed substantive due process *in the area of family relations*, while distinguishing economic substantive due process by implicitly arguing, through an adaptation of Frankfurter's *Kovacs* concurrence, that family integrity, like free speech, is essential to an open society.

Justice White's view that privacy rights rest upon the Due Process Clause has become the view of the Court, while Justice Douglas's penumbral analysis has been abandoned. Even Douglas, however, managed in *Griswold* to rhetorically echo *Meyer*'s presumption that the family is more basic than the state, and thus deserves judicial and constitutional protection from the state:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.³⁹⁴

Similarly, the Court's invalidation of miscegenation statutes in 1967 reaffirmed the intimate link between the protection of traditional forms of familial association and the protection of minorities.³⁹⁵

393. *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (1965) (White, J., concurring) (citations omitted).

394. *Id.* at 486.

395. See *Loving v. Virginia*, 388 U.S. 1 (1967).

From 1923 to 1967, the Court consistently articulated a theory of privacy that protected the "realm of family life" without reference to contemporary concepts of individual autonomy. The Court's theory of privacy was generally consistent, despite the confusion caused by the intervening abandonment of economic substantive due process. The Court perceived that the Constitution, and particularly the Due Process Clause, protected an implicit historical and traditional American understanding about the primacy of the family in relation to government. The Court realized that majorities attempted to use state power to prevent minorities from cultural and physically reproducing themselves from generation to generation, and thus that protection of the family served to protect minorities. The Court implicitly recognized that protecting the family, like protecting free speech, was a means of ensuring an open society, a society in which the cultural orthodoxies of one generation are not permanently frozen.

2. Family Sphere Theory and the Rejection of Autonomy

The Supreme Court's development of a family sphere theory of privacy was accompanied by a rejection of autonomy theory. The early opinions, like *Meyer*, are so wrapped in traditionalism, and in common law concepts, that the possibility of autonomy never arises. When the *Meyer* Court determined that the "liberty" protected by the Due Process Clause included "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," they implicitly, if unconsciously, excluded abortion, divorce, sodomy, and fornication from the protections of the Fourteenth Amendment. By the 1960s, however, the possibility of reshaping privacy from the protection of the family to the protection of individual autonomy was becoming evident. The Justices, however, initially rejected it. This rejection can be seen most clearly in the opinions of the second Justice Harlan.

Justice Harlan explained his acceptance of substantive due process analysis in his 1961 dissent in *Poe v. Ullman*.³⁹⁶ The majority in *Poe* refused to review the constitutionality of Connecticut's anticontraception statutes, based on the lack of a true present controversy.³⁹⁷ Justice Harlan dissented on grounds of justiciability, and then proceeded to articulate his view that the Connecticut statutes were unconstitutional. Justice Harlan noted that the Court had refused to limit the due process clauses to either *procedural* due process or the incorporation of the Bill of Rights.³⁹⁸ He found two

396. 367 U.S. 497, 522 (1961).

397. *Poe*, 367 U.S. at 501-08.

398. See *id.* at 540-41 (Harlan, J., dissenting).

roles for substantive due process. First, the Due Process Clause is a bar to arbitrary legislation to the degree that it requires all laws to be rationally related to some governmental interest.³⁹⁹ Second, "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."⁴⁰⁰ Justice Harlan thereby accepted the view that some enumerated rights are "*fundamental*," because they "belong . . . to the citizens of all free governments."⁴⁰¹

Justice Harlan rejected any "formula"⁴⁰² or "mechanical yardstick"⁴⁰³ for evaluating substantive due process claims. At the same time, he rejected unbridled judicial restraint. Justice Harlan thus explained his judicial methodology in substantive due process cases:

The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute . . . for judgment and restraint.⁴⁰⁴

Justice Harlan restated similar views four years later in *Griswold*:

Judicial self-restraint . . . will be achieved . . . only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.⁴⁰⁵

Justice Harlan, based on this methodology, apparently accepted the view that parental rights were fundamental based on "the teachings of his-

399. *See id.* at 541-43 (Harlan, J., dissenting).

400. *Id.* at 543 (Harlan, J., dissenting) (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

401. *Id.* at 541 (Harlan, J., dissenting) (citation omitted) (emphasis added).

402. *Id.* at 542 (Harlan, J., dissenting).

403. *Id.* at 544 (Harlan, J., dissenting).

404. *Id.* at 542 (Harlan, J., dissenting).

405. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (citing *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)).

tory . . . [and] the basic values that underlie our society." At the same time, however, Justice Harlan limited the reach of privacy to the traditional family:

[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must be built upon that basis.⁴⁰⁶

Significantly, Justice Harlan included abortion, euthanasia, and suicide among those controversial moral issues about which states generally should be free to legislate.⁴⁰⁷

Justice Harlan's reliance on American moral traditions to shape privacy indicates an implicit rejection of autonomy theory. His ultimate conclusion that Connecticut's anticontraceptive laws, even if based on long-standing moral views, were unconstitutional, was based on the distinction between marital and nonmarital sexuality:

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.⁴⁰⁸

Thus, the American tradition of protecting marriage and the intimacies of marriage outweighs state efforts to regulate the manner of that intimacy, at least to the degree it is consensual. The family that is protected is, more-

406. *Poe*, 367 U.S. at 545-46 (Harlan, J., dissenting).

407. *See id.* at 547 (Harlan, J., dissenting).

408. *Id.* at 553 (Harlan, J., dissenting).

over, the traditional family, the form of the family as it has historically existed in American society.

A number of other Justices echoed Justice Harlan's traditionalism in the course of affirming privacy rights during the 1960s. Justice Douglas's majority opinion in *Griswold* ended by rhetorically echoing traditional American marriage vows and implying that the family has priority in time and rights to the state.⁴⁰⁹ Justice Goldberg's concurring opinion in *Griswold*, which was joined by Chief Justice Warren and Justice Brennan, echoed Douglas's embrace of marriage while asserting that statutes prohibiting adultery and fornication are "beyond doubt" constitutional.⁴¹⁰

In retrospect, the use or acceptance of traditionalist rhetoric and methodology by Justices Douglas and Brennan to legitimize the right of privacy appears disingenuous. A mere seven years after *Griswold*, Justice Brennan began the campaign to transform privacy. *Eisenstadt v. Baird* involved the prosecution of Bill Baird, a reproductive rights activist.⁴¹¹ Baird was convicted of giving a woman a contraceptive article at the conclusion of a lecture at Boston University.⁴¹² The State had prosecuted Baird under a provision restricting the distribution of contraceptive articles to doctors or pharmacists.⁴¹³ Justice Brennan, however, treated the case as though it turned on the marital status of the woman, even though both the indictment and the record failed to disclose such status. Brennan thus used the case to pose the question of whether a rational basis could be found for distinguishing between the married and the unmarried. Brennan supplemented this rational basis equal protection analysis with the following now-famous dicta:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so

409. *Griswold*, 381 U.S. at 486.

410. *Id.* at 498 (Goldberg, J., concurring).

411. *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (Baird had standing to raise constitutional issues because he was an advocate of rights of persons to obtain contraceptives.).

412. *Id.* at 440. Baird was initially also convicted for exhibiting contraceptive articles during the lecture, but this conviction was overturned by the state court on free speech grounds. *Id.*

413. *Id.* at 441-42; *id.* at 462 (White, J., concurring); *id.* at 465-66 (Burger, C.J., dissenting).

fundamentally affecting a person as the decision whether to bear or beget a child.⁴¹⁴

Thus, in a few words Justice Brennan swept aside the assurances of Justice Harlan that privacy "must build upon" traditional American understandings of morality and the family, and Justice Goldberg's corresponding assurance that anti-fornication and anti-adultery statutes were "without doubt" constitutional. Implicit in the final sentence alone are most of the holdings sought by autonomy theorists: the right to contraception, the right to abortion, the right to engage in consensual sexual activity, and the view that these rights attach to individuals regardless of their marital status. Justice Brennan's reduction of marriage to an association of self-interested individuals parallels precisely the view of associations articulated fourteen years later in Justice Blackmun's *Hardwick* dissent. By 1972, Brennan had diverted privacy from its fifty year heritage of protecting the family onto the new path of protecting individual autonomy.

Roe was before the Court when Brennan authored his *Eisenstadt* opinion. Brennan's claim that privacy protected the decision whether to "bear or beget" a child was apparently aimed at establishing the abortion and contraceptive rights as an indivisible whole. Indeed, after *Roe*, Brennan appeared to use the phrase "bear or beget" to refer to the range of choices involved in contraception and abortion.⁴¹⁵ Privacy as autonomy, then, at the very outset, was created with the abortion right in view.

Once privacy was reinterpreted as an autonomy right, the Court quickly moved to establish its legitimacy by citing the parental rights cases of the 1920s, as well as subsequent cases from the 1940s through the 1960s concerning traditional family relationships. The Court attempted to join these family sphere cases to the new autonomy rights they were creating and enforcing during the 1970s and 1980s, and thereby create one indissolvable and supposedly well-established right.⁴¹⁶ This use of the older family sphere cases to legitimate the new autonomy was particularly ironic, in that the 1970s and 1980s was an era where the Court largely abdicated its prior role in protecting the sphere of the family. During this time, the traditional family was struggling against governmental authorities in the areas of education, birth, and child rearing, while the judiciary, from the Supreme Court on down, generally sided with the state.⁴¹⁷ The failure of the Court to protect the traditional family during this period is further evidence that

414. *Id.* at 453 (citations omitted) (emphasis in original).

415. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

416. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citations omitted), *aff'd in part, overruled in part* *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992).

417. See *supra* notes 164-210 and accompanying text.

the creation of the abortion right, and reformulation of privacy as autonomy, was really the creation of an entirely new constitutional doctrine. Moreover, where privacy-as-autonomy has conflicted with the protection of traditional family associational rights, the Court has generally and clearly favored the former, and newer, theory of privacy. The creation of privacy-as-autonomy, then, has served to displace and weaken the Court's previous doctrine of family privacy. *Meyer* and its progeny, properly understood, support the destruction, rather than the recognition, of abortion and autonomy rights.

II. CONCLUSION

Autonomy and abortion rights, properly understood, represent a detour from the Court's seventy year tradition of protecting the family. The Court has not yet found its way back from the chaos wrought by judges who, in the words of Justice Harlan, "felt free to roam" in an effort to remake society in their own image. This attempt to remake society has been a failure, precisely because it failed to honor "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."⁴¹⁸ Despite twenty years of virtually unrestricted abortion, we have discovered that the tie of our society to respecting unborn human life is not easily broken. Protecting an unborn child is really not the same thing as hating a black man, in the eyes of our people and our tradition. The underlying tie of our people and our law to the family, and to morality, has further been tested, but not broken.

The Court's recent claims that it would undermine the very legitimacy of the nation for the Court to admit and overrule an erroneous decision only exacerbates our divisions, by suggesting that a question of national import once determined by nine appointed men somehow becomes an immutable part of our national covenant. Ironically, the Court's broad views of constitutional interpretation and *stare decisis* make the original understandings of the Constitution less mutable than the Court's later judicial glosses and amendments. It is as though the people had "resigned their Government into the hands of that eminent tribunal."⁴¹⁹ The people, however, have not resigned their basic right to self-government; rather, it is the

418. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

419. *Casey*, 505 U.S. at ___, 112 S. Ct. at 2883 (Scalia, J., concurring in part and dissenting in part) (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES*, S. DOC. NO. 10, 101st Cong. 1st Sess. 139 (1989)).

Court that has seized authority from the people. The result, now as in the past, is the spectre of a broken covenant.

The Court may continue on its current path indefinitely, defiantly asserting that a vote cast by seven men in 1973 is the nation's last and only significant word on the legalization of abortion. Admittedly, the national covenant will not break immediately or apparently, in the sense of civil war or governmental breakdown. Over time, however, a large and significant segment of this nation's population—a group that this nation has time and again asked to sacrifice for the common good—will cease to identify itself with what is perceived as “a covenant with death and an agreement with hell.”⁴²⁰ The results of such a broken covenant cannot be foreseen, but they are sure to be profound.

The legacy of Justice Harlan suggests that the way back from this abyss would require the Court to reject the past twenty years of autonomy theory, while building on the seventy year tradition of family sphere theory. This protection of the traditional family is the living constitutional tradition. A role for the Court remains here, as it seeks both to protect the sphere of the family and to guarantee that majorities do not use the state to prevent religious and other minorities from physically and culturally reproducing themselves. As social conflict continues, and intolerance from the right and from the left grows, the Court should ensure that we are able both to speak of what matters to us, and to live and pass on our ways of life to our children.

The Court cannot and should not settle all of America's deep divisions. However, the Court can give us the right, within the limits of ordered liberty, to use our political and personal liberties to remain divided. This right to be and remain divided, to be and remain, if desired, a “discrete and insular minority”—a community within the communities that comprise America—is basic to what it means to be free in America. But the very question of when we are free to be different, when we are free to be let alone, cannot be entirely decided by any court. The very question of when we must leave one another alone, and when we are free to use governmental power to bind us together in a particular way, goes to the heart of what it means to be an American. The freedom to be let alone is not always more basic than the coercive political demands of the political community. Every society, as Justice Harlan taught us, has found it necessary to deal coercively with some consensual or solitary conduct. We all, despite our best efforts at insularity, affect one another.

420. *Abortion and a Nation at War*, *supra* note 312, at 13 (quoting a slavery abolitionist of the Constitution as interpreted by the Supreme Court).

Freedoms regarding speech and the family are basic to this constitutional balance because both freedoms are essential to the very political process by which this balance is achieved, and also because they represent absolute limitations on the ability of the political community to squash dissent. The Constitution, however, deliberately leaves many questions to the political process itself. The balance between political cohesion and toleration is, beyond the absolute boundaries of the Constitution, a political and legislative question. The boundaries of the civil community, in terms of the status of the preborn, is at this point in our history by necessity also largely a political question. The Court, in this and so much else, cannot substitute for the acts of the people in governing themselves.

A reversal of autonomy and abortion rights, and possible reinvigoration of family rights, would therefore renew, rather than end, our national debate on autonomy, abortion, sexuality, and the family. The rest—how we live and worship, what we seek politically and personally, how we dialogue with others and teach our children—would, as always, be decided by the American people. It is likely that we would discover in the course of this debate that we are very different from one another, and that different states, regions, and cultural and religious traditions would seek rather different balances between community and tolerance. Paradoxically, however, it is only when the Court allows our diversity about diversity to emerge that the hope of American freedom will have the opportunity to flower.